Supreme Court, U.S.
FILED
00-826 AUG 0 2000
OFFICE OF THE CLERK

No.

In the
Supreme Court of the United States

MICHAEL BONDS,

Petitioner,

v.

MILWAUKEE COUNTY, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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86 pp

QUESTIONS PRESENTED

1. Is it constitutional for a public employer to take adverse employment action against a public employee for speech on a matter of public concern that did not discuss the policies or view points of that employer because that employee holds a policy making job?

2. Is it constitutional to consider the policy making characteristics of a public employee's job when balancing the interest of a public employee to speak out on a matter of public concern against a public employer's interest in the efficient performance of its functions when the speech did not discuss the view points or policies of that public employer?

3. Is it constitutional for a public employer to take adverse employment action against its employee for speech on a matter of public concern without first conducting a reasonable investigation to determine the content, context, and circumstances of that speech?

4. Is it constitutional for a public employer to take adverse employment action against its employee for speech on a matter of public concern based on predictions of future disruption and disloyalty that are not objectively reasonable?

LIST OF PARTIES

The parties to the proceedings before this Court are:

Petitioner:

MICHAEL BONDS, individually.

Respondents:

MILWAUKEE COUNTY, a body corporate of the State of Wisconsin created and existing pursuant to Chapter 2 of the Wisconsin Statutes.

KAREN ORDINANS, **WILLIAM HART**, and **THOMAS KUZMA**, individually.*

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* The District Court for the Eastern District of Wisconsin dismissed Bonds's complaint against the individual defendants in a decision and order dated December 7, 1998 that resolved the individual defendants' motion for summary judgment based on qualified immunity. This matter proceeded to trial against Milwaukee County only. The district court's judgment in favor of Milwaukee County was the subject matter of Bonds's appeal to the Seventh Circuit.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Michael Bonds, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled matter on March 28, 2000.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 207 F.3d 969 (7th Cir. 2000). On May 23, 2000, the Court of Appeals issued its order denying petitioners' Petition for Rehearing and Rehearing En Banc.[1] Both are reprinted in the appendix hereto. *App. 1-31 and App. 32-33.* The Findings of Fact and Conclusions of Law[2] and the Judgment of the United States District Court for the Eastern District of Wisconsin are reprinted in the appendix hereto. *App. 34-44 and App. 45.*

JURISDICTION

This matter was commenced in the Circuit Court for Milwaukee County, Wisconsin on August 7, 1997 under 42 U.S.C. §1983 and two state law claims: wrongful termination and intentional interference with a prospective contractual relationship. Milwaukee County removed this matter pursuant to 28 U.S.C. §1441 to the District Court for the Eastern District of Wisconsin. The District Court for the

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[1] A vote of the members of the court of appeals authorized to vote was requested and three judges voted to grant the petition for rehearing en banc. In addition, Judge Cudahy voted to grant the petition for panel rehearing.

[2] The district court adopted Milwaukee County's proposed findings of fact and conclusions of law.

Eastern District of Wisconsin had jurisdiction under 28 U.S.C. §1331 and §1343. On April 20, 1999, after a bench trial, the district court rendered judgment for Milwaukee County on Bonds's 42 U.S.C. §1983 claim.[3]

The Court of Appeals for the Seventh Circuit had jurisdiction over this matter pursuant to 28 U.S.C. §1291. On March 28, 2000, the court of appeals entered a judgment and opinion holding that Milwaukee County's rescission of its job offer to Bonds because of his speech at a public forum on July 26, 1997 did not violate Bonds's First Amendment rights because Milwaukee County's action was justified by its interests in government efficiency and workplace harmony. Judge Cudahy filed a dissenting opinion.

On May 23, 2000, the court of appeals denied Bonds's Petition for Rehearing and Rehearing En Banc.

This Court has jurisdiction to review this matter pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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[3] Bonds's two state law claims were dismissed by the district court in a decision and order dated April 20, 1998 that resolved Milwaukee County's first motion for summary judgment. Summary judgment was denied with respect to Bonds's First Amendment/Section 1983 claim. The individual defendants were dismissed from the case in a decision and order dated December 7, 1998 that resolved the individual defendants' motion for summary judgment based on qualified immunity.

Fourteenth Amendment to the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case involves speech on a matter of public concern by a public employee where the speech did not criticize or discuss the policies or view points of the public employer that took the adverse job action. The district court, following a bench trial, ruled in Milwaukee County's favor and dismissed Michael Bonds's complaint.

Prior to trial, the parties stipulated to damages and causation. Therefore, the sole issue presented for trial was whether Milwaukee County's rescission of a July 23, 1997 job offer to Michael Bonds because of his speech on City of Milwaukee policies at a public forum on July 26, 1997 violated Bonds's free speech rights under the First Amendment to the United States Constitution as enunciated in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983). The court of appeals affirmed the district court's judgment, Judge Richard Cudahy dissented.

A. Background

Bonds[4] was offered employment by Milwaukee County on July 23, 1997 as an Administrative Secretary III-Policy Research Analyst for the Milwaukee County Board of Supervisors. This job involved performing research and analysis for the County Board of Supervisors. The job did not involve the direct formulation or implementation of policy.

Bonds accepted the job offer on July 25, 1997, and tendered his resignation from his position with the City of Milwaukee. His scheduled start date at Milwaukee County was August 11, 1997.

On July 31, 1997, Milwaukee County withdrew its job offer because of a July 27, 1997 article in the Sunday *Milwaukee Journal Sentinel* that reported on Bonds's comments at a forum sponsored by the Community Brain Storming Conference on Saturday, July 26, 1997.

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[4] Bonds holds two masters degrees and a Ph.D. in Urban Studies from the University of Wisconsin-Milwaukee. He has dedicated most of his professional career to public service.

1. Bonds's Employment at the City of Milwaukee.

At the time he received the Milwaukee County job offer, Bonds was employed by the City of Milwaukee. His position was Community Development Block Grant Fiscal Analyst-Senior for the Community Development Policy Committee[5] (hereinafter "CDPC").

Bonds did not work for the Mayor or the Common Council directly. Rather, Bonds worked for and reported to Alderman Frederick Gordon, the Vice Chairman of the CDPC, and the person who hired Bonds. Bonds's job was to provide Alderman Gordon and the CDPC with independent and critical analysis as a check on the recommendations of the Mayor and the Community Block Grant Administration. Bonds had considerable expertise in the Community Development Block Grant funding process which is a highly complex process involving the inner workings of various layers of government bureaucracy.[6]

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[5] The CDPC is a committee comprised of Milwaukee aldermen and members of the city administration. The purpose of the committee is to review, analyze, and make recommendations regarding the distribution and allocation of millions of dollars in Community Development Block Grant funds that the city receives annually from the federal government. In general, the Mayor's Office, through the Community Block Grant Administration, an arm of the mayor's administration, would make recommendations regarding funding allocations to the CDPC. The CDPC would then consider and approve funding allocations and these recommendations would then be considered and approved by the full common council. The mayor would then have the opportunity to either approve or veto the common council's action.

[6] Bonds's doctoral dissertation prepared in connection with his Ph.D. candidacy was entitled *Vanishing Hope: Race, Politics and the Distribution of Community Development Block Grant (CDBG) Funds in Milwaukee, 1975-1997.*

In the spring of 1997, the Mayor proposed a new method for the distribution and allocation of Community Development Block Grant funds known as "Neighborhood Strategic Planning". This new approach generated intense debate both within city government and in the community at large.

Bonds was directed by Alderman Gordon to analyze the Neighborhood Strategic Planning process and prepare a written report. This report was highly critical of the Neighborhood Strategic Planning process. Alderman Gordon agreed with Bonds's criticism of the Neighborhood Strategic Planning process.

2. The Appearance at the Community Brain Storming Conference Forum.

In early July 1997, Alderman Gordon was invited to participate as one of several panelists at a forum sponsored by the Community Brain Storming Conference to discuss the Neighborhood Strategic Planning process and other issues relating to Community Development Block Grant policy. The Community Brain Storming Conference is a well established organization that sponsors monthly meetings on social and political issues of importance to Milwaukee's African American community.

Alderman Gordon asked Bonds to appear in his place. Alderman Gordon also told Bonds to provide blunt analysis of the Neighborhood Strategic Planning process at the forum and tell people what they needed to do to get the process changed.

The day before the forum, the Common Council voted to divert certain Community Development Block Grant funds from North Side neighborhoods to South Side neighborhoods as part of the Neighborhood Strategic Planning process. Bonds was also critical of this decision because he felt that it jeopardized racial harmony in Milwaukee and was deceptive.

Michael Bonds attended the Community Brain Storming forum on July 26, 1997, held at a church on a Saturday morning, in place of Alderman Gordon. He made a presentation that recited the findings of his written report prepared at the direction of Alderman Gordon and described the impact of the Common Council's funding decision of the previous day. In addition, in response to a question from the audience, Bonds listed some of the actions that citizens could take if they disagreed with the Mayor or Council's policies. However, Bonds did not advocate for any particular course of action.

On July 26, 1997, Bonds did exactly what his boss, Alderman Gordon, asked and expected him to do. He reported on his analysis and criticism of the Neighborhood Strategic Planning process and explained the actions people could take if they disagreed with the Mayor and the Council.

The Community Development Block Grant funding process was, in July, 1997, the subject of intense public interest in Milwaukee. Bonds was one of the foremost experts on this subject. The policies, actions, and view points of Milwaukee County were not discussed at the forum. The subject at issue involved the policies and actions of the City of Milwaukee.

3. Milwaukee County's Response to Bonds's Speech.

Karen Ordinans (the County Board Chairperson and ultimate decision maker in the hiring decision at issue here) withdrew Milwaukee County's job offer because of Bonds's speech as reported in the *Milwaukee Journal Sentinel*. *F of F, #17 & 18; App. 39-40.* However, Karen Ordinans was not present at the forum; did not speak to anyone who was present; did not talk to Bonds about his actual comments or the circumstances under which they were made; and did not talk to his boss, Alderman Gordon.

Three County Supervisors complained to Ordinans (the County Board consists of 25 supervisors) about Bonds's comments as reported in the newspaper. However, none of these Supervisors were present at the forum nor did they speak to anyone who was present, or speak to Bonds about his actual comments or the circumstances under which they were made. None of these Supervisors talked to Bonds's boss, Alderman Gordon.

However, at least six other County Supervisors did not find Bonds's appearance at the forum or his reported comments to be inappropriate. Five of these County Supervisors, as members of the County Board's African American Caucus, signed an August 7, 1997 letter urging Ordinans to reconsider her decision to withdraw the County's job offer.

4. The City of Milwaukee's Response to Bonds's Speech.

Following Milwaukee County's withdrawal of Bonds's job offer on July 31, 1997, Bonds was allowed to continue in his position as Fiscal Analyst-Senior to the CDPC for the remainder of 1997. This position was eliminated in early 1998 and Bonds was transferred to the City's Legislative Reference Bureau (the research arm of the Common Council) as a Policy Analyst. In April, 1998, Bonds received a substantial pay raise. At all relevant times, Bonds was an exempt or at-will employee with the City. He had no civil service or other job tenure protection. The City could have terminated Bonds at any time or refused to allow him to return to his job after he tendered his resignation. Bonds was never disciplined or reprimanded by the City of Milwaukee because of his comments or appearance at the July 26, 1997 forum.

B. Decision in the Court of Appeals

In affirming the district court's judgment, the court of appeals held that Bonds's July 26, 1997 comments was

speech on a matter of public concern (disagreeing with the district court, *C of L, #2; App. 16-17*), but that under the *Pickering* balancing test, Milwaukee County's action was justified because the County's interest in government efficiency and workplace harmony outweighed Bonds's interest in speaking. The court of appeals also held that the so called "policy maker" exception did not form a basis for rescinding the job offer (again disagreeing with the district court, *C of L, #6; App. 43*) because Bonds's comments did not implicate Bonds's politics or any Milwaukee County policies. However, the court of appeals also found that the policy making status of Bonds's Milwaukee County job weighed decisively in the County's favors in striking the *Pickering* balance.

REASONS FOR GRANTING THE WRIT

A. Introduction

This case stands out from the broad array of fact intensive public employee/free speech cases because of the following four factors:

1. The importance of the speech on a matter of great public concern.

2. The speaker's knowledge of and expertise in the subject matter.

3. The fact that Bonds's speech did not discuss or criticize any Milwaukee County officials or Milwaukee County policies or view points.

4. The fact that Milwaukee County did not conduct a meaningful investigation into the content, context, or circumstances of the speech before deciding to take adverse employment action.

These four factors bring into clear focus the central issue which is the extent to which public employers can prevent/

punish the speech of policy making employees[7] on matters of public concern when that speech does not criticize or discuss the policies, view points, or actions of that public employer but the policies of another unit of government. The answer to this question has profound consequences for public employees and for the public at large because this decision stands for the proposition that public employers enjoy wide latitude, and perhaps the absolute right, to prevent/punish the speech of certain categories of employees on any subject of public concern and, therefore, wide latitude to constrain the information that well informed and experienced pubic employees (usually those in policy making jobs) can convey to the public on any subject.

In addition, this decision brings into clear focus the junction between two distinct lines of First Amendment jurisprudence of this Court when the speech of high level or policy making employees is at issue. Since this Court's decision in *Pickering v. Board of Education*, 391 U.S. 563 (1968), this Court has consistently held that the right of public employees to speak out on matters of public concern was to be determined according to a balancing test that

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[7] Bonds has generally conceded that the Milwaukee County job had at least some policy making characteristics although his job would certainly lay at the low end of the spectrum of those jobs which court's have held constitute policy making positions. *See*: *McVey v. Stacy*, 157 F.3d 271 (4th Cir. 1998) (airport manager); *Moran v. State of Washington*, 147 F.3d 839, 849-851 (9th Cir. 1998) (Deputy Commissioner of Consumer Advocacy in Office of Insurance Commissioner); *Weisbach v. County of Los Angeles*, 119 F.3d 778, 783-84 (9th Cir. 1997) (Medical Director of the Dept. of Health Services); *Warzon v. Drew*, 60 F.3d 1234 (7th Cir. 1995) (Controller of the County Dept. of Administration); *Kinsey v. Salado Independent School District*, 950 F.2d 988 (5th Cir. 1992) (en banc), *cert. denied*, 504 U.S. 941 (1992) (school superintendent); and *Hall v. Ford*, 856 F.2d 255 (D.C. Cir. 1988) (university athletic director).

weighed the government's interest as an employer to prevent or punish employee speech against the employee's interest in speaking. However, since this Court's decision in *Elrod v. Burns*, 427 U.S. 347 (1976), this Court has consistently held that the employment of high ranking or policy making public employees can be conditioned on political loyalty and party affiliation without violating the First Amendment rights of those employees. *Pickering* postulated a balancing test while *Elrod* set forth a categorical test.

In this decision, the court of appeals has adopted a de facto categorical approach to determining the free speech rights of high level or policy making employees because the court of appeals held that a policy making employee like Bonds can be punished for speech on matters of public concern even though that speech does not criticize the policies, actions, or view points of that employee's employer. The court of appeals held that certain classes of public employees can be punished for any act of speech or expressive conduct regardless of content, substance, or view point because of the type of job they have.

If it is the law of the United States that policy making employees enjoy little if any First Amendment protection to speak out on any matters of public concern as the *Bonds* majority apparently believes, and that such employees can be disciplined for speech in the same way they can be disciplined for political affiliation under *Eldrod*, then this Court should declare this evolving principle of First Amendment jurisprudence. Public employees need to know whether their job status or the *Pickering* balancing factors will determine the parameters of their free speech rights.[8]

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[8] Clarification by this Court will reduce the volume of litigation in the area of public employee free speech since high ranking or policy making employees will know that their job position gen-

(continued...)

Moreover, the court of appeals has declared in clear and certain terms that a public employee's free speech rights are inversely related to the value of the information that employee can impart to the public. A low level city janitor with little insight on the inner workings of government has broad rights while the employee that is in a position to know what ails government and can provide useful and meaningful information to the electorate to advance the process of self government has narrow or non-existent rights. As such, the First Amendment value of promoting and facilitating self government, which this Court has repeatedly stated is one of the core principles of the Free Speech Clause,[9] has been stood on its head under this decision—the more self government would benefit from public employee speech the more government, as an employer, has the right to stifle that speech. Few, if any, lower court decisions have declared this rule so clearly.

Therefore, review is necessary to (i) bring the Seventh Circuit into conformity with this Court's jurisprudence; (ii) reconcile and settle conflicts among the circuits; (iii) determine whether the free speech rights of policy making employees is to be determined according to a balancing approach or a categorical approach; and (iv) affirm that public employee speech on matters of public concern is vital

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(...continued)
erally precludes public speech or expressive conduct. Litigation will instead focus on the job duties of the employee rather than fine distinctions about what constitutes a "matter of public concern" and open ended balancing of a limitless variety of factors favoring and disfavoring employee speech.

[9] *McIntyre v. Ohio Elections Com'n*, 514 U.S. 334, 344-347 (1995); *Carey v. Brown*, 447 U.S. 455, 467 (1980); *Bond v. Floyd*, 385 U.S. 116, 135-137 (1966); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964); *Roth v. United States*, 354 U.S. 476, 484 (1957).

to self government and the public's right to information concerning the ever expanding functions of the bureaucracies and agencies that govern our lives.

B. Under the Balancing Approach of *Pickering v. Board of Education*, this Matter Should have been Decided in Bonds's Favor.

Judge Cudahy's dissent notes that "Pickering sounds very much like the present case." *Bonds v. Milwaukee County*, 207 F.2d 969, 983-984 (7th Cir. 2000); *App. 22*. Judge Cudahy is right, however, the court of appeals majority reached a different result than *Pickering*.

Pickering v. Board of Education, 391 U.S. 563 (1968) established that a public employee cannot, consistent with the Free Speech clause of the First Amendment, be terminated or otherwise retaliated against by his/her employer for commenting upon matters of public concern unless the interest of the employee, as a citizen, in commenting on a matter of public concern is outweighed by the interest of the State, as employer, in promoting the efficiency of the public services it performs through its employees. *Id.*, at 568-569.

In *Pickering*, a public school teacher wrote a letter to a newspaper criticizing the school board's allocation of public funds. *Id.*, at 569. After a "full hearing", the school board fired Pickering having determined that the letter was "'detrimental' to the efficient operation and administration of the schools of the district and hence . . . that interests of the schools require(d) (his dismissal)." *Id.*, at 564-565.

Here, Bonds made a speech at a public forum criticizing the Community Development Block Grant funding policy of the City of Milwaukee. As in *Pickering*, Milwaukee County concluded that Bonds's speech indicated he would, in essence, be detrimental to the "efficient operation and administration" of Milwaukee County. Unlike *Pickering*, Milwaukee County did not conduct a "full hearing" before dismiss-

ing Bonds and Bonds did not criticize Milwaukee County, the employer who took the adverse job action, but criticized the policies of another unit of government.

Finding that Pickering's dismissal violated his First Amendment rights, the Court held that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." *Id.*, at 574.

In reaching this result, the Court noted that Pickering's speech was "in no way directed towards any person with whom appellant [Pickering] would normally be in contact in the course of his daily work as a teacher." *Id.*, at 569. Therefore, the Court found that "no question of maintaining either discipline by immediate superiors or harmony among co-workers is present here." *Id.*, at 570.

In the present case, Bonds's speech was not directed at anyone with whom he would "normally be in contact in the course of his daily work" as a Research Analyst for the Milwaukee County Board. Again, Bonds spoke about the policies and officials of the City of Milwaukee.

The *Pickering* Court found that issues involving the allocation of public funds are questions on which "free and open debate is vital to informed decision making by the electorate." *Id.*, at 571-572. The *Pickering* Court went on to state that "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." *Id.* at 572.

Similarly, in the present case, Bonds was a member of the community who had "informed and definite opinions" on a question (Community Development Block Grant policy) that

involved the allocation of public funds. Accordingly, like Pickering, it is "essential" that Bonds "be able to speak out freely on such questions without fear of retaliatory dismissal."

Bonds's offending speech falls squarely within the scope of speech by a public employee that this Court held cannot form a basis for dismissal. As in *Pickering*, the present case is a case "in which the fact of employment [with Milwaukee County] is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher" and therefore, "it is necessary to regard the teacher as the member of the general public he seeks to be." *Id.*, at 574. The subject matter of Bonds's speech was, at best, only "tangentially and insubstantially" related to his prospective Milwaukee County employment. As such, from Milwaukee County's perspective, Bonds was speaking as member of the general public when he gave his remarks on July 26, 1997. Finally, as in *Pickering*, Bonds's offending speech did not occur in the Milwaukee County work place.

Therefore, the court of appeals majority opinion is inconsistent with *Pickering*.

At this point, Milwaukee County will argue that the *Bonds* majority drew a distinction between *Pickering* and the present case based on the fact that Bonds's future Milwaukee County job was a policy making position and therefore greater weight needs to be given to Milwaukee County's concern about efficiency and workplace harmony. While the court of appeals said that the policy maker exception articulated in this Court's line of cases beginning with *Elrod v. Burns,* 427 U.S. 347 (1976) and *Branti v. Finkel,* 445 U.S. 507 (1980) did not justify Milwaukee County's adverse job action on a per se basis, the court did hold that the policy making aspects of Bonds's future job "swings the [Pickering] balance in the County's favor." *Bonds*, 207 F.3d at 981; *App. 18*. In essence, the court of

appeals' decision turned on its conclusion that Bonds's policy making status was "a critical factor in applying the Pickering balancing." *Bonds*, 207 F.3d at 981; *App. 18*. The majority went on to say that free speech protection should only be accorded to that speech by policy making employees **"that bears almost no relation to the demands required of policymaking employees"** (emphasis added) *Bonds*, 207 F.3d at 982; *App. 19*. This amounts to establishing a categorical approach to the free speech rights of policy making employees.

However, decisions in other circuits that have considered an employee's policy making status in striking the *Pickering* balance in the employer's favor have all done so in the context of speech that directly criticized the policy, view point, or action of the employer. *Bonds* is the only reported decision where the policy making status of the employee was considered in striking the *Pickering* balance in favor of the employer in the context of speech that did not implicate or criticize the policies or view point of the public employer taking the adverse job action.

1. Other Circuits have Held that the Policy Making Status of a Public Employee's Job is not a Factor in the *Pickering* Balancing Analysis When the Speech did not Implicate the Policies or View Points of the Public Employer Taking the Adverse Job Action.

Hall v. Ford, 856 F.2d 255 (D.C. Cir. 1988) involved the termination of a university athletic director (Hall) because he disagreed with the policies of the university's president. The court held that Hall's speech involved matters of public concern, but concluded that "Hall could be dismissed for expressing views on matters within the core of his responsibilities that reflected a policy disagreement with his superiors such that they could not expect him to carry out their policy choices vigorously." *Id.*, at 311.

In reaching this result, the court of appeals found that Hall's status as a policy making employee justified the termination. The court explained its methodology in the policy making/*Pickering* balancing context as follows:

> We will ask first whether the employee's position relates to an area as to which there is room for principled disagreement on goals and their implementation. [citations omitted] In other words, is it a policy area? If so, we then ask whether the office gives the employee broad responsibilities with respect to policy formulation, implementation, or enunciation. Put differently, was the individual a policy level employee? If both criteria are met, we ask whether the government interest in accomplishing its organizational objectives through compatible policy level deputies is implicated by the employees speech. [citations omitted] **At a minimum, the employee speech must relate to policy areas for which he is responsible**. [emphasis added]

Id. at 310.

Since Hall was found to be a policy making employee, the court held that "[t]he University had a significant interest in ensuring that Hall was, perceived to be, compatible with the President and Board." *Id.* at 310. The court went on to state that "Hall's speech directly interfered with this interest, as he engaged in a pattern of opposition to the policies of his superiors." *Id.* at 310.

Had *Bonds* been decided by the D.C. Circuit under *Hall*, the outcome would have been different because in *Bonds*, the speech did not "relate to policy areas for which he [Bonds] is responsible" in his Milwaukee County job, and Bonds did not "engage in a pattern of opposition to the policies of his superiors." In *Hall*, the D.C. circuit held that the speech must relate to the job responsibilities of the policy maker. In *Bonds*, the majority held that policy maker considerations will be considered in connection with any and all public employee speech. *Bonds* therefore conflicts

with *Hall* and represents a substantial diminution of public employee free speech since, under *Bonds*, a policy making employee can be punished for speech on any subject of public concern.

2. Other Courts of Appeals that have Considered Policy Making Factors in Striking the *Pickering* Balance in Favor of the Employer have all Done so in the Context of Employee Speech that was Critical of the View Point or Policy of the Employer Taking the Adverse Job Action.

Hall, not *Bonds*, is consistent with the decisions in other circuits that have applied policy maker considerations in striking the *Pickering* balance in favor of the employer.[10] In all of the following cases in which the employer prevailed,

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[10] In *Gonzalez v. Benavides*, 774 F.2d 1295 (5th Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986), the Fifth Circuit ruled in favor of a policy making employee (the executive director of a community action agency) on his First Amendment retaliatory discharge claim finding that the employee's interest in speaking out on a matter of great public concern outweighed the employer's concerns about loyalty and the impact of the speech on close working relationships. Significantly, the employee in Gonzalez directly criticized the actions of the public body he reported to.

A recent court of appeals decision also ruled in the employee's favor in a situation where the employee was found to be a policy maker but the speech did not involve the employer's politics or substantive policy position. In *Barker v. City of Del City*, ___ F.3d ___, 2000 WL 771767 (10th Cir. June 15, 2000), the court vacated summary judgment in favor of the employer on the employee's (the employee was the Administrative Assistant to the City Manager) First Amendment retaliatory discharge claim because the employer had not presented sufficient evidence that the employee's speech on matters outside of her employment responsibilities (speech to a newspaper reporter about an open meeting law violation) was disruptive.

the speech at issue was critical of the policies, actions, or view points of the public employee's employer: *Lewis v. Cowen*, 165 F.3d 154, 163-166 (2nd Cir. 1999), *cert. denied*, ___ U.S. ___, 120 S.Ct. 700 (1999); *McVey v. Stacy*, 157 F.3d 271, 277-279 (4th Cir. 1998); *Moran v. State of Washington*, 147 F.3d 839, 849-851 (9th Cir. 1998); *Flynn v. City of Boston*, 140 F.3d 42, 47-48 (1st Cir. 1998), *cert. denied*, 525 U.S. 961 (1998); *McEvoy v. Spencer*, 124 F.3d 92, 98-104 (2nd Cir. 1997); *Weisbach v. County of Los Angeles*, 119 F.3d 778, 783-84 (9th Cir. 1997); *Rash-Aldridge v. Ramirez*, 96 F.3d 117, 119-120 (5th Cir. 1996); *Bates v. Hunt*, 3 F.3d 374 , 378 (11th Cir. 1993); and *Kinsey v. Salado Independent School District*, 950 F.2d 988 (5th Cir. 1992) (en banc), *cert. denied*, 504 U.S. 941 (1992).

In all the cases, other than *Bonds*, where the courts of appeals have considered policy making factors in striking the *Pickering* balance in favor of the public employer, the public employer was concerned with the substance of the employee's speech or expressive behavior—that the view point expressed was contrary to the employer's decision, action, or policy in a particular area. However, in the present case, Milwaukee County was only concerned with the fact that Bonds spoke—on any subject. Karen Ordinans did not take issue with the substance of Bonds's comments. The majority decision in *Bonds* noted that "[t]he County concedes that Bonds's substantive viewpoint on the NSPP was basically untroubling, given its distance from the development and implementation of the program." *Bonds*, 207 F.3d at 978; *App. 12*.

At this point Milwaukee County will no doubt argue that it was not the fact that Bonds spoke out on any subject that justified its adverse job action, but that Bonds spoke out in a way that demonstrated disloyalty and insubordination to his City of Milwaukee employer. However, as will be demonstrated below, Bonds's comments were not disloyal or insubordinate to his boss, Alderman Gordon, and the City

took no adverse job action against Bonds. Thus, it is indeed the act of speech—on any subject—that drove Milwaukee County's concerns. Milwaukee County simply did not want to employ someone who got his name in the paper regardless of the subject matter.

The implication for the First Amendment is that, under *Bonds*, any act of speech or expressive conduct on any subject of public concern will expose policy making employees to adverse employment action. The employee's job status will become determinative—a categorical test. Therefore, this decision conflicts with decisions in other circuits and conflicts with decisions of this Court under the *Pickering/Connick*[11] line of cases.

Perhaps policy making employees should have no right to speak out on any subject of public concern because of the need for loyalty and trustworthiness in high level government jobs. In other words, "going public" or "getting your name in the paper" in connection with any subject interferes with the need for loyalty and trustworthiness on a per se basis.[12] However, at present, the law among the circuits, except for the Seventh Circuit in *Bonds*, draws the line at speech that criticizes the policies or view points of the employer. *Bonds* goes beyond that line.

If *Bonds* is right and the other circuits are wrong, this Court should clarify this conflict for the benefit of all public

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[11] The *Pickering* Court took notice of the possible impact of policy making considerations in striking the Pickering balance but premised its discussion on the fact that the confidential or policy making employee's speech criticized his/her employer's actions or policies. *Pickering*, 391 U.S. at 570, n. 3.

[12] Judge Easterbrook in his concurring opinion in *Wilbur v. Mahan*, 3 F.3d 214, 221 (7th Cir. 1993) essentially called for a categorical approach to determining the free speech rights of high level policy making employees.

employers and employees. If *Bonds* is wrong, this conflict should be corrected for the benefit of public employers and policy making employees in the Seventh Circuit who now have no free speech rights unless their speech has no relationship to the demands of their job.

C. The *Bonds* Decision is Contrary to this Court's Decision in *Waters v. Churchill.*

In *Waters v. Churchill,* 511 U.S. 661 (1994) a plurality of this Court held that in the public employee/free speech context, public employers must conduct a reasonable investigation into what a public employee said, the context in which it was said, and why it was said before it can retaliate against that public employee for his/her speech. *Waters* also requires that a judgment by a public employer about the future harm of an employee's speech must have some basis in fact, and may not be based on mere speculation or an inaccurate assessment of what actually happened and why. In other words, a public employer's predictions of future harm and disruption must be objectively reasonable. The plurality stated that the appropriate test is "the care that a reasonable manager would use before making an employment decision—discharge, suspension, reprimand, or whatever else—of the sort involved in the particular case." *Id.*, at 678.

The *Bonds* majority correctly determined that Milwaukee County's predictions of future harm had to be reasonable. However, in actually finding those predictions reasonable, the majority sanctioned reliance on rank speculation by a public employer about the future consequences of public employee speech.

Judge Cudahy's dissent squarely addressed this shortcoming. He stated:

> The fundamental error that I see in the majority's analysis is in taking the expressed concerns of County

> officials at face value without requiring some showing that subjective concerns were supported by objective reality. . . . Potential problems may certainly figure in the Pickering analysis, but there must be some plausible link between what has happened in the real world and what might happen in the future. [citations omitted] Here we have a single episode in which a speaker may have engaged in rhetorical excesses. This may indicate a too fervent commitment to a point of view, but it is pure speculation that 'workplace dissension' is anywhere in sight. The majority theorizes that the small size of the County staff would contribute to bad working relations with Mr. Bonds. This is just a wild guess based on a single speech.

Bonds, 210 F.3d at 985-986; *App. 26-27*.

The *Bonds* decision is, therefore, contrary to *Waters* and conflicts with decisions in other circuits.

1. Decisions in Other Circuits have Shown a Strong Aversion to Accepting Rank Speculation About the Future Consequences of Public Employee Speech.

Hubbard v. Environmental Protection Agency, 949 F.2d 453 (D.C. Cir. 1992), *rev'd on other grounds*, 982 F.2d 531 (D.C. Cir. 1992) (en banc), involved an applicant (Hubbard) for a criminal investigator position with the Environmental Protection Agency ("E.P.A."). In the course of Hubbard's prior employment as a detective with the District of Columbia Metropolitan Police Department he had engaged in certain speech activity that the court found to be a subject of public concern. When the E.P.A. learned of this activity it decided not to hire Hubbard even though he was their top candidate. The court held that the E.P.A. passed Hubbard over in violation of Hubbard's free speech rights under *Pickering*.

The E.P.A. refused to hire Hubbard because the hiring official had a "gut feeling" that Hubbard lacked sensitivity

to the proper handling of sensitive information in on going investigations based on the prior incident of speech and that Hubbard had had improper contacts with the press in connection with his prior speech. None of Hubbard's speech activity involved any officials or policies of the E.P.A. but related to a drug investigation while Hubbard was a detective. The E.P.A. argued that this information justified its adverse job action because Hubbard's prior speech activity, in essence, demonstrated that if he were given a job at the E.P.A. he would engage in actions that could be disruptive, insubordinate, and damaging to morale and discipline. The E.P.A. relied on its predictions of Hubbard's future behavior to justify its adverse job action—an argument that is identical to Milwaukee County's in the present case that was accepted by the court of appeals majority.

However, the Hubbard court struck the *Pickering* balance in Hubbard's favor. The court stated that "it is clear that 'unadorned speculation as to the impact of speech . . . on the government's enterprise will not suffice.' [citations omitted] In this case, Hubbard was denied a job solely on the basis of Beacon's 'unadorned speculation' about Hubbard's supposed press contacts." *Id.*, at 285.

The court found it significant that, like the present case, Hubbard had been authorized by the D.C. Police Department to engage in his prior speech activity, had not been found to be insubordinate by the D.C. Police Department in connection with this speech and was never disciplined by the D.C. Police Department for any improper conduct during the investigation in which the offending speech occurred. *Id.*, at 284-285. In short, like the case here, Hubbard's speech was not found to be disruptive or insubordinate by his then employer whose interests were directly implicated by Hubbard's speech. In such circumstances, the Hubbard court stated that a prospective employer cannot rely on a prediction of harm and disruption to justify adverse job action when the employer directly implicated by

the speech did not find the employee insubordinate or disruptive. On this point the court of appeals majority in *Bonds* is in direct conflict.

In *Heil v. Santoro*, 147 F.3d 103, 109-110 (2nd Cir. 1998) the court stated that "[s]ubstantial weight must is accorded the government employer's prediction that given speech has the potential for disruptiveness, but its prediction must be reasonable. Thus an employer that has received a report of such speech must make a reasonable investigation before deciding to take action against the employee."

In *Sexton v. Martin*, 210 F.3d 905, 911-912 (8th Cir. 2000), the court stated that

> Before the Court commences the *Pickering* balancing test, however, it is critical to determine whether the defendant has produced sufficient evidence that the speech had an adverse effect on the efficiency of the employer's operation. See *Burnham v. Ianni*, 119 F.3d 668, 678 (8th Cir. 1997). In other words, to put the *Pickering* balancing test at issue, the public employer must proffer sufficient evidence that the speech had a adverse impact on the department. See id. The more the employee's speech reflects matters of public concern, the greater the employer's showing must be that the speech was disruptive before the speech can be punished.

The court went on to state that "'a simple assertion by the employer that contested speech affected morale, without supporting evidence,' is not enough to support a grant of qualified immunity. [citations omitted] Mere allegations of disruption are insufficient to put the *Pickering* balance at issue." *Id.*, at 912.

In *Melton v. City of Oklahoma City*, 879 F.2d 706 (10th Cir. 1989), *cert. denied*, 502 U.S. 906 (1991), the court stated:

> The dissent's assertion notwithstanding, we are not creating a new rule nor are we increasing the quantum

> of proof which the government must carry. We merely recognize what we believe to be an obvious *Pickering* requirement that the government show *some* ascertainable damage to its functioning as a result of the challenged speech. *Accord Roth v. Veteran's Admin*, 856 F.2d 1401, 1407 (9th Cir. 1988); *Connor v. Reinhard*, 847 F.2d 384, 390 (7th Cir. 1988); *Zamboni v. Stamler*, 847 F.2d 73, 78 (3rd Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 245 (1988); *American Postal Workers Union v. Postal Services*, 830 F.2d 294, 303 n. 12 (D.C. Cir. 1987). In our view the government cannot prevail in a *Pickering* balance by merely relying on *unsubstantiated* allegations of disruption. Some circuits appear to take the position that a reasonable belief that disruption will occur is sufficient, at least in some circumstances. *See, e.g., Matherne v. Wilson*, 851 F.2d 752, 761 n. 53 (5th Cir. 1988); *Jurgensen v. Fairfax County*, 745 F.2d 868, 879 (4th Cir. 1984); *Waters v. Chaffin*, 684 F.2d 833, 839 n. 12 (11th Cir. 1982). None, however, accept purely speculative allegations. Here, the City made no showing of disruption, or for that matter, potential disruption; only a bald assertion that Mr. Melton's actions in communicating with Page's counsel implicated the City's confidentially interests. [emphasis in original]

Id., at 716, n. 11. *See also*, *Jantzen v. Hawkins*, 188 F.3d 1247, 1257 (10th Cir. 1999); *Cragg v. City of Osawatomie*, 143 F.3d 1343, 1347 (10th Cir. 1998); and *Moore v. City of Wynnewood*, 57 F.3d 924, 934 (10th Cir. 1995).

In *Nunez v. Davis*, 169 F.3d 1222, 1229 (9th Cir. 1999), *cert. denied*, ___ U.S. ___, 120 S.Ct. 932 (2000) the court stated, quoting with approval from *McKinley v. City of Eloy*, 705 F.2d 1110 (9th Cir. 1983), that "'real, not imagined, disruption is required, and the 'close working relationship' exception cannot serve as a pretext for stifling legitimate speech or penalizing public employees for expressing unpopular views.'"

In *Brasslett v. Cota*, 761 F.2d 827, 845 (1st Cir. 1985), the court considered the public employer's claim that the em-

ployee's speech "demonstrated a severe lack of judgment that eroded the crucial confidence that the Town Manager must have in department heads." *Id.*, at 845. The court stated

> where First Amendment rights are concerned, 'operational efficiency objections must be real and important before they can serve as a basis for discipline or discharge of a public employee.' [citations omitted] Unless we require that the employer's alleged loss of confidence and trust in his employee be objectively reasonable, public employers could promiscuously offer a subjective justification that could almost never effectively be rebutted.

Id., at 845.

Comparing these decisions with *Bonds*, it is apparent that public employees in the Seventh Circuit face a different standard of proof when their employer claims that their speech is, or is likely to be, disruptive.

2. Milwaukee County did not Conduct a Reasonable Investigation.

Based on the standard enunciated in *Waters*, Milwaukee County did not conduct a reasonable investigation into the context and circumstances surrounding Bonds's speech. Milwaukee County's "investigation" consisted of reading the newspaper, listening to the complaints of three of 25 County Supervisors who also relied on what they read in the newspaper, a short phone call between Bill Hart (the County Board's Chief of Staff) and Bonds, and the review of several documents submitted by Bonds to Hart. No hearing or investigation of the type conducted by the employer in *Pickering*, *Connick* or *Waters* was conducted by Milwaukee County.

No one at Milwaukee County talked to Bonds's boss, Alderman Gordon, about Bonds's job duties and responsibil-

ities or why he was at the forum. No one bothered to talk to anyone who actually heard what Bonds said at the forum. Karen Ordinans, the ultimate decision maker, never talked to Bonds about his comments. The three County Supervisors who objected to Bonds's speech never spoke to Bonds about his speech.

As Judge Cudahy pointed out in his dissent:

> What was totally lacking in the Bonds case was any investigation to discover exactly in what context he made his remarks, what was his relation to Alderman Gordon, whether the Alderman directed him to make the remarks on the Neighborhood Strategic Planning Process and a variety of other matters that might reflect on Bonds' alleged "insubordination" and "disruption".

Bonds, 210 F.3d at 986; *App. 28.*

Had Milwaukee County conducted a reasonable investigation it would have discovered facts that would have severely undermined its concerns about efficiency and work place harmony because Bonds's speech at the forum was in fact consistent with his employment responsibilities at the City and the views of his boss, Alderman Gordon. Milwaukee County would have discovered that Bonds's actions were consistent with the quality of loyalty and trustworthiness that it so highly valued.

Moreover, with respect to Bonds's alleged comments regarding the actions that citizens could take to change the process, a reasonable investigation would have revealed that these comments were in response to a question from the audience that inquired about what steps citizens could take if they disagreed with the Mayor's program or the Common Council's decision. Bonds listed the available remedies. He did not specifically advocate for any particular remedy—a pointed noted in Judge Cudahy's dissent. *Bonds*, 210 F.3d at 984; *App. 23-24.*

Finally, the reasonableness of Milwaukee County's concerns about what Bonds might do in the future must be measured in light of the actions of the City of Milwaukee. If any unit of government should have had concerns about efficiency, work place harmony, or insubordination, it was the City of Milwaukee.

After Bonds's comments were delivered and the subsequent withdrawal of the county job offer, the City of Milwaukee did not discipline or reprimand Bonds and had no problem allowing Bonds to continue in his job as Fiscal Analyst-Senior to the CDPC. Bonds continued to provide critical analysis and, ultimately, the CDPC accepted Bonds's concerns and modified the Neighborhood Strategic Planning process. His views were essentially vindicated, but at the cost of his county job.

The foregoing observations point out why this Court requires a reasonable investigation into the content, context, and circumstances of speech rather than permitting public employers to rely on "knee jerk" or "gut feelings" that later turn out to be untrue or exaggerated. This is why the plurality in *Waters* stated "it is important to ensure not only that substantive First Amendment standards are sound, but that they are applied through reliable procedures. That is why we have often held some procedures— . . . a particular quantum of proof . . . —to be constitutionally required in proceedings that may penalize protected speech." *Waters*, 511 U.S. at 669, and why Judge Cudahy pointed out in dissent that:

> The alternative to an investigation is to give full credence to every fleeting concern and every vagrant fear felt by officials of the prospective employer when they have read a brief account of an incident in the newspaper. If nothing is required of the prospective employer beyond rampant speculation, the burden on First Amendment rights is unacceptable.

Bonds, 210 F.3d at 987; *App. 29*.

While the *Bonds* majority talked about the "reasonableness" of Milwaukee County's judgment, it is patently obvious that the majority defined "reasonable" as whatever Milwaukee County said was reasonable despite undisputed evidence, available at the time of Milwaukee County's decision, that showed that Milwaukee County's judgment was wrong. As such the majority's application of the *Pickering* balancing test conflicts with decisions of this Court and the decisions in other circuits.

3. The Degree of Deference to be Accorded a Public Employer's Prediction About Future Harm Arising from Employee Speech on a Matter of Public Concern has Great Constitutional Significance.

The standard for determining when predictions of future disruption, disharmony, and disloyalty will prevail over a public employee's right to speak out and the public's right to hear this information is critical to the protection of fundamental First Amendment interests. If the majority opinion is allowed to stand, public employees in the Seventh Circuit will be effectively denied all First Amendment protections to speak on matters of public concern because there will never be a case that reaches the *Pickering* balancing test where the public employer will not now assert that a public employee's speech on any matter of public concern has the potential to disrupt the smooth functioning of government at some point in the future. It will not matter that the facts do not support this judgment or that the assertion defies common sense. The mere subjective assertion will enable the public employer to prevail. As such, the public employer, not the federal courts, will be the final arbiter of First Amendment rights.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to the United States Court of Appeals for the Seventh Circuit to review the questions presented by this Petition.

Respectfully submitted,

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App. 1

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 99-2282

MICHAEL BONDS,

Plaintiff-Appellant,

v.

MILWAUKEE COUNTY, KAREN ORDINANS,
WILLIAM HART and THOMAS KUZMA,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 97 C 921—**Joseph P. Stadtmueller**, *Chief Judge*.

ARGUED OCTOBER 14, 1999—DECIDED MARCH 28, 2000

Before HARLINGTON WOOD, JR., CUDAHY and KANNE, *Circuit Judges*.

KANNE, *Circuit Judge*. Defendant Milwaukee County argues that this is a textbook case of protected employment action under the policymaking employee exception to the First Amendment. Plaintiff Michael Bonds publicly criticized his government employer on a matter of public concern, while serving in a "policymaking" position, and suffered adverse employment treatment based on his speech. Indeed, if that was the case without more, we would apply the policymaking employee exception first enunciated in *Elrod v. Burns*, 427 U.S. 347, 367-68 (1976), in a straightforward affirmance for the County.

The facts, however, are not so simple. While working for the City of Milwaukee, Bonds appeared at a public meeting and criticized a program that the City adopted the previous day as "sinister" and "pitting black against white." Based on this, the County of Milwaukee rescinded its offer of employment to Bonds. Thus, Bonds criticized the City of Milwaukee, his government employer at the time, but received adverse action from a different government body, the County of Milwaukee, for whom Bonds was to begin employment in two weeks.

The policymaking employee exception does not cover a government entity's refusal to hire based on the prospective employee's criticism of a different government entity for whom he had worked. Nonetheless, we apply the balancing test of First Amendment and government employer interests from *Pickering v. Board of Education*, 391 U.S. 563 (1968), and find that the County's decision not to hire Bonds was justified by its interests in government efficiency and workplace harmony. We affirm judgment for the County.

I. HISTORY

The Community Development Block Grant Committee for the City of Milwaukee ("City") is an elected body of ten officials that makes all policy decisions regarding the distribution of Community Development Block Grant ("CDBG") funds received by the City from the federal government. Michael Bonds, who had endured a decade of postgraduate study on the CDBG program, was a natural fit as senior fiscal analyst for the Block Grant Committee. In that position, Bonds evaluated policy proposals for the distribution of CDBG funds and oversaw the allocation of $30 million in federal funding.

In the spring of 1997, Milwaukee Mayor John Norquist proposed a novel method for the distribution of CDBG money, called the Neighborhood Strategic Planning Process ("NSPP"). The NSPP restructured the distribution

process by dividing Milwaukee into seventeen service areas within each of which community groups would compete for portions of their respective area's funding allocation. Pursuant to his duties for the City, Bonds researched the NSPP and became a staunch opponent. Bonds authored a highly critical report, dated July 14, 1997, condemning the NSPP as "seriously flawed" and warning that it "pits poor people (black, white, and hispanics) on the southside of the city against those on the northside." Despite Bonds's report and amid intense public scrutiny focused on what Bonds testified was "the hottest issue in City government during that period," the City adopted the NSPP in final form on July 25, 1997.

Unhappy with his role at the City, Bonds had been contemplating a move out of city government and had applied for employment as a research analyst with the Milwaukee County Board of Supervisors ("County" or "Board of Supervisors"). Karen Ordinans, chairperson of the Board of Supervisors, interviewed Bonds after Bill Hart, Ordinans's chief of staff, selected Bonds as one of five finalists for the position from more than seventy applicants.

During the hour-long interview, Ordinans told Bonds that she "expected staff to be providers of information, to be objective about the research and analysis and not get into the political part of debating issues and making policy decisions." Bonds replied that "he knew that whether he disagreed or agreed with a decision made by the County Board, that it was not his place to publicly comment on it or get into it." Impressed with Bonds's experience and demeanor, Ordinans offered the position to him around July 23, 1997. Bonds accepted her offer in a letter dated July 25, 1997, and gave the City his notice of resignation, effective August 8, 1997.

On July 26, 1997, one day after Bonds accepted the position with Milwaukee County, Bonds participated as a panelist in a "Community Brainstorming Conference" on the NSPP at the request and in place of Alderman Fred Gordon. The forum, held at a Milwaukee church, featured

five speakers offering alternate viewpoints on the block grant program and the NSPP. The schedule for the forum listed Bonds as a "Community Development Policy Committee Analyst." At trial, the parties disputed the substance of Bonds's remarks at the forum, but the district court determined that Bonds was openly critical of the NSPP as "sinister" and attacked both the City, still his employer at the time, and Mayor Norquist. The Milwaukee Journal Sentinel reported these events in its July 27, 1997, edition as follows:

> City analyst decries block grant funds shift
>
> A Common Council decision to shift $660,000 in Community Development Block Grant money from north side neighborhoods to some on the south side is "sinister" and should result in an attempt to recall Mayor John Norquist if he does not veto it, a city analyst told an applauding north side audience Saturday.
>
> "Anyone who is concerned about racial harmony should be at City Hall raising hell," said Michael Bonds, an analyst for the Block Grant Policy Committee, at a meeting Saturday of the Community Brain Storming Conference. "This is pitting black against white when we should be working together."
>
> * * *
>
> Bonds, who said he is quitting his city job to take a similar position with the Milwaukee County Board, was one of six panelists at the session held at St. Matthew's C.M.E. Church, 2944 N. 9th St. He urged people to call Norquist and demand that he veto the measure and to file protests with the U.S. Department of Housing and Urban Development. He also called on African-Americans serving on the block grant task force to resign in protest.

Reports of Bonds's performance sparked immediate outrage at Milwaukee County. Two county supervisors, Daniel Diliberti and Jim McGuigan, called Ordinans to voice concerns about Bonds's future employment with the

County. Diliberti testified that he left a message for Ordinans saying that he would have found it "very difficult to work with [Bonds] if he was giving his opinion or would criticize the policy-making body that he was working for." He explained, "I wouldn't want staff on the County Board that disagreed with my decision and then publicly criticize[d] me for it." McGuigan testified that he left a message for Ordinans expressing concern that Bonds was "trying to be a policymaker" and warning that the County "didn't need a 26th supervisor." Another county supervisor, Robert Krug, was "shocked" by the reports of Bonds's conduct and opined to Hart that Bonds's statements "were very wrong, and [he] would be very concerned about having somebody on staff that would be willing to make statements like that publicly in the press."

Alarmed, Hart called Bonds on July 28, 1997, to investigate the events described in the Milwaukee Journal Sentinel. Bonds told Hart that the newspaper account reported his comments out of context but admitted that the "main thrust" of the article was correct. Bonds explained that he was simply trying to inform the community about the NSPP and present it with different options for protest. Later that day, in an attempt to allay Hart's concerns, Bonds faxed several documents to Hart including a written apology to Mayor Norquist and a memorandum to the Milwaukee Common Council clarifying his comments at the forum.

Ordinans was "very shocked" by Bonds's conduct at the forum. Ordinans hired Bonds for the trusted analyst position believing that Bonds would be discreet and reserve his personal misgivings from public attention. Yet Bonds displayed "extremely poor judgment" in openly criticizing a decision of the policymaking body for which he worked and making inflammatory comments regarding a politically controversial matter on which he had worked. Ordinans felt that "if this guy is going to question the Common Council as a policy-making body, he could certainly do it again and question a policy decision that was going to be

made by the Milwaukee County Board." She explained at trial that his behavior "immediately sent signals to [her] that [she] was going to have a big problem on [her] hands if this person came on board." Indeed, Bonds's own superior Alderman Gordon was stunned by Bonds's inappropriate "diatribe" that "created a fire storm" of unwanted political controversy. Gordon explained that he had to perform "damage control" and was "besieged with phone calls" for days regarding the incident. Gordon felt that Bonds certainly spoke on his own behalf because he "never said to Mr. Bonds to criticize the process as being sinister, [he] never called for Mr. Bonds to state that the Mayor should be recalled, [he] never said anything like that."

Furthermore, Ordinans believed that Bonds would cause dissension in her workplace. Bonds's performance was widely publicized, and Ordinans felt that "the staff would have had resentment" because "[t]hey do not conduct themselves as Mr. Bonds did." Particularly given the small size of her workplace, with only seven staffers serving twenty-five supervisors, Ordinans sought "a staff that works harmoniously as a team" and needed "staff that any supervisor could feel comfortable and confident going to." Yet several county supervisors already expressed skepticism that they would be able to work with Bonds. Hart testified at trial that Bonds "would not have started his tenure at the County Board of Supervisors with a great degree of credibility, and there were Supervisors who . . . from day one would probably not trust Mr. Bonds." After considering the concerns of Diliberti, McGuigan, Krug and Hart, Ordinans decided to withdraw the offer of employment. She feared that hiring Bonds would turn out to be a "disaster" and explained at trial, "If our seven research staff were out in the community conducting themselves this way, my job would be complete chaos."

On July 31, 1997, worried that Bonds might be without a job once she withdrew her offer, Ordinans called the

City to confirm that Bonds would be able to retain his job there. Satisfied that Bonds could continue with the City, Ordinans asked Hart to call Bonds and withdraw the offer of employment, which he did that day.

A week later, on August 7, 1997, Bonds sued the County in Milwaukee County Circuit Court under 42 U.S.C. § 1983 alleging that the County withdrew its employment offer because of Bonds's public comments on July 26, 1997, in violation of the First Amendment. Bonds also pleaded two state law claims: wrongful termination and intentional interference with a prospective contractual relationship. The County removed the suit under 28 U.S.C. § 1441 to the Eastern District of Wisconsin and moved for summary judgment on all three counts. On April 20, 1998, the district court denied summary judgment on Bonds's First Amendment claim but dismissed both Bonds's state law claims. Exactly one year later on April 20, 1999, after a bench trial, the district court rendered judgment for the County on Bonds's First Amendment claim, ruling that Milwaukee County's interests as an employer outweighed Bonds's free speech interests. Bonds now appeals three district court findings of fact and the judgment against him.

II. ANALYSIS

A. Findings of Fact

To begin, we address Bonds's challenge to the following district court findings of fact: (1) Bonds's comments created substantial disruption for the City; (2) Alderman Gordon viewed Bonds's comments as inflammatory and inappropriate and requested an apology from Bonds; (3) Bonds issued apologies to the Common Council and Mayor Norquist for his comments at the forum. We will reverse the district court's findings of fact only if we are convinced that those findings are clearly erroneous. *See Hudson v. Burke*, 913 F.2d 427, 431 (7th Cir. 1990).

None of these challenged findings constitutes clear error. Bonds contends that the first two findings are unsupported by the record, but both derive directly from the deposition testimony of Alderman Gordon. Gordon explained unequivocally in his deposition that Bonds's comments were absolutely inappropriate and sparked a "fire storm" of outrage that besieged him with phone calls for several days. Although Gordon did not testify that he demanded an apology, Gordon asked Bonds to explain himself, and Bonds immediately apologized for his remarks at the forum. Regarding the third finding of fact, Bonds argues that Bonds's letters to the Common Council and Mayor Norquist were not "apologies," but rather clarifications of his comments at the July 26 forum. Bonds's private intent notwithstanding, the district court reviewed the letters and found that these letters, which expressed Bonds's regret for his conduct at the forum, constituted apologies to the Council and the Mayor. This was not clear error.

B. First Amendment Retaliation

Bonds's central claim on appeal is that the County violated his First Amendment rights by discriminating against him based on his speech and conduct at the July 26 community forum. Bonds's claim highlights the fact that the First Amendment places the government in two potentially conflicting roles with respect to its public employees. The government *qua* government owes public employees the First Amendment protections that it owes all citizens. Although public employees once forfeited First Amendment protection by virtue of their employment with the government, *see Adler v. Board of Educ.*, 342 U.S. 485 (1952); *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (Mass. 1892), this is no longer so. Speech by government employees, completely divorced from the employment context, is protected under the same standard as speech by those who are not government employees. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Keyishian v. Board*

of Regents, 385 U.S. 589, 605-06 (1967). The government *qua* employer, however, may apply legitimate employment standards in regulating the workplace and promoting efficient operation. This often requires the government to regulate the speech of its employees in a manner that, outside the employer-employee relationship, would violate the First Amendment. In navigating between these weighty concerns, courts must balance the First Amendment against the government's interests as an employer.

The Supreme Court first framed this balance in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), explaining that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." Thus it is necessary to "arrive at a balance between the interests of the [citizen], in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* In evaluating a public employer's regulation of its employee's speech on matters of public concern under the First Amendment, *Pickering* balancing requires the court to weigh the employer's interest in government efficiency and effectiveness on one hand, and the public employee's free speech interests on the other hand.

Subsequent to *Pickering*, the Court developed a "policymaking employee exception" to *Pickering* balancing under the First Amendment. In *Elrod v. Burns*, 427 U.S. 347, 367 (1976), the Court held in a plurality opinion that patronage dismissals of non-policymaking employees, based on their partisan affiliation, violated the First Amendment. However, the Court also carved a narrow exception for termination based on partisan affiliation of an employee who acts "as an adviser or formulates plans for the implementation of broad goals," *id.* at 368, because "representative government [should] not be undercut by

tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." *Id.* at 367. For these sensitive government positions, termed "policymaking" jobs, the government employer has a heightened need for trust and confidence that its subordinates are guided by the same political compass and will exercise their discretion in a manner consistent with their shared political agenda. Here, the government employer's need for political allegiance from its policymaking employee outweighs the employee's freedom of expression to such a degree that it obviates *Pickering* balancing.

The Court expanded this exception in *Branti v. Finkel*, 445 U.S. 507, 518 (1980), beyond employees with policymaking input, to any employee for whom "party affiliation is an appropriate requirement for the effective performance of the office involved." We have interpreted this definition of a policymaking employee to include positions in which "'the individual authorizes, either directly or indirectly, meaningful input into government decisionmaking on issues where there is room for principled disagreement on goals or their implementation.'" *Warzon v. Drew*, 60 F.3d 1234, 1239 (7th Cir. 1995) (quoting *Nekolny v. Painter*, 653 F.2d 1164, 1170 (7th Cir. 1981)). In his position with the County, Bonds would have contributed meaningful input on County policy by producing research on which the Board of Supervisors would base its decisions, and Bonds conceded that his analyst job would have constituted a "policymaking" position.

The unique facts of this case present the following question in unusually sharp relief—whether the policymaking employee exception to the First Amendment exempts adverse employment action based on speech unrelated to political affiliation or viewpoint. While conceding his status as a "policymaker," Bonds argues that *Pickering* balancing applies nevertheless because his termination was not based on "political reasons" as contemplated by *Elrod* and *Branti*. In fact, the County agrees that "political reasons," defined in the usual sense, were not the

basis for its decision to rescind the offer. That is, it had no objection to the substance of Bonds's statements regarding the NSPP at the July 26 forum but instead found it dismaying that Bonds chose to speak publicly against his then-employer. In the typical case, the public employer objects to the fact that the policymaking employee speaks publicly against it, but also objects to the substance of the employee's speech, namely that it contradicts and criticizes its own positions. The twist in this case is that Bonds was not yet working for the County on July 26, and the speech at issue criticized his then-employer, the City of Milwaukee, and not the entity whose employment decision is at question here, the County. The County did not object to Bonds's speech on the basis of its viewpoint, but rather objected to the fact that Bonds publicly criticized his employer. We therefore must decide whether a refusal to hire based on political speech qualifies for the policymaking employee exception when the motivation is unrelated to political viewpoint. The district court's refusal to apply the policymaking employee exception is a question of law which we review *de novo*. *See Selch v. Letts*, 5 F.3d 1040, 1043 (7th Cir. 1993).

To date, following *Elrod* and *Branti*, we have interpreted the policymaking employee exception to exempt employer action from *Pickering* balancing when it is based primarily on political motivations. In addition to political affiliation, we extended the exception to cover employer action against political expression in *Wilbur v. Mahan*, 3 F.3d 214 (7th Cir. 1993). There, the policymaking employee exception protected a sheriff's termination of a deputy sheriff who decided to run against him in the upcoming sheriff's election. *See id.* at 217-18. Although the deputy sheriff belonged to the same political party as his superior, the rationale of the exception covered political expression, such as running for office against one's superior, that compromised the trust and loyalty from policymaking employees essential to government employers. We noted that the First Amendment does not require

"a public official to hire, or retain, in a confidential or policymaking job, persons who are not his political friends and may be his political enemies." *Id.* at 218. The exception rests upon the need of a public employer to "trust the occupants of the confidential positions to keep his secrets [and] the occupants of the policymaking positions to carry out his policies with fidelity and diligence." *Id.* at 217. When a policymaking subordinate contests his superior's elected position in an election, "the political enmity that the candidacy is certain to engender entitles the boss to fire him." *Id.* at 218.

In *Warzon v. Drew*, 60 F.3d 1234, 1238 (7th Cir. 1995), we held that the rationale for the policymaking employee exception also covered viewpoints relating to the policymaking employee's duties. We ruled that the termination of a policymaking employee, whose duties included management of the Milwaukee County health-care plan and who openly challenged her superior's health-care policy positions, did not violate the First Amendment. *See id.* Consistent with the policymaking employee exception, disagreement between the employer and the policymaking employee over job-related policy issues causes the same failure of loyalty and shared political mission between superior and subordinate as inconsistent political affiliation or viewpoint. In deference to the public employer's interests in government effectiveness and efficiency, we decided that an employer can punish policymaking employees who disagree with it on job-related policy. *Id.*; *see also Flynn v. City of Boston*, 140 F.3d 42, 47 (1st Cir. 1998); *Hall v. Ford*, 856 F.2d 255, 265 (D.C. Cir. 1988).

This case, however, presents a more complicated factual posture. Ordinans explained that the County chose not to hire Bonds because his remarks evidenced shortcomings of trustworthiness, propriety and loyalty to his public employer. The County conceded that Bonds's substantive viewpoint on the NSPP was basically untroubling, given its distance from the development and implementation of the program. Instead, the County viewed Bonds's speech

as insubordination against his then-employer and feared that Bonds might repeat such an episode in his new job with the County.

The policymaking employee exception does not immunize public employer action unconnected to and unmotivated by need for political loyalty. For example, in *Marshall v. Porter County Plan Commission*, 32 F.3d 1215, 1221 (7th Cir. 1994), we held that a government employer could not terminate a policymaking employee for speech criticizing her employer's abuse of office because the speech did not involve her political or policy viewpoints. Furthermore, we explicitly have left open the question whether a government employer could cite the policymaking employee exception to limit its policymaking employees' speech unrelated to the performance of their duties. *See Ryan v. Illinois Dep't of Children & Fam. Servs.*, 185 F.3d 751, 759 (7th Cir. 1999); *Warzon*, 60 F.3d at 1239 n.1; *Marshall*, 32 F.3d at 1221; *Wilbur*, 3 F.3d at 218.

Although an employee's status as a policymaker bears considerable attention when weighing the interests of the government, the policymaking employee exception does not apply and courts must apply *Pickering* balancing when the speech at issue does not implicate the employee's politics or substantive policy viewpoints. The policymaking employee exception does not cover all employee speech, *see Wilbur*, 3 F.3d at 217, and speech unrelated to job duties or political viewpoint runs too remote from the interests that animate the exception. True, Bonds's speech addressed a controversial issue in a political setting, but the County did not decide against him for the political viewpoint of his speech. Bonds was not hired because County executives believed he was disloyal and indiscreet. The policymaking employee exception does not apply to the rescission of Bonds's job offer because the County did not withdraw its offer for "political reasons," and *Pickering* balancing thus applies.

Under *Pickering*, a government employee must satisfy the following two-part inquiry to prove unlawful discharge

under the First Amendment: (1) the speech must address a matter of public concern; and (2) the employee's First Amendment interest on this matter must not be outweighed by any injury that the speech might inflict on the government interest in promoting the efficiency of its public services. *See Pickering*, 391 U.S. at 568. We review *de novo* the district court application of the *Pickering* test. *See Messman v. Helmke*, 133 F.3d 1042, 1046 (7th Cir. 1998); *Hulbert v. Wilhelm*, 120 F.3d 648, 653 (7th Cir. 1997).

Under the first prong of *Pickering*, we consider "the content, form, and context of a given statement" to determine whether Bonds's speech regarded a matter of public concern. *Connick v. Myers*, 461 U.S. 138, 147 (1983). Bonds addressed a subject of great public interest, and his particular statements were relevant to the public at large, not just Bonds personally. Bonds intended to provide information about the NSPP, which had been approved just a day earlier by the City and was the subject of intense public attention, at a community forum for interested citizens. This certainly constituted participation "in a public dialogue on matters of interest to the public" and discussion of "public issues rather than merely a personal grievance." *Dinshow v. School Dist. of Rib Lake*, 77 F.3d 194, 197 (7th Cir. 1996).

The County admits that the NSPP was a widely publicized matter of much political controversy and importance, but insists that *Pickering* protects speech by a government employee on a public concern only when spoken within the employee's role "as a citizen" and not "as an employee." The County argues that all Bonds's comments were made "as an employee" because he represented the City at the forum and would not have appeared but for his employment duties. According to the County, Bonds's speech is thus unprotected regardless whether it addressed a matter of public import. However, the County's proposed approach improperly places decisive weight on the fact that Bonds appeared at the forum as part of his job, without evaluating the speech itself at all.

The cases cited by the County, which purportedly apply its approach, consider whether the employee spoke pursuant to her employment duties as a contextual factor in deciding that the relevant speech did not touch on a matter of public concern. These cases hold that speech is unprotected when the employee is not voicing her personal opinions, but instead is conveying information on behalf of another as part of her duties, *see Youker v. Schoenenberger*, 22 F.3d 163, 165 (7th Cir. 1994), speaking about personal grievances that relate only tangentially to a greater political issue, *see David v. City & County of Denver*, 101 F.3d 1344, 1355-56 (10th Cir. 1996); *Thomson v. Scheid*, 977 F.2d 1017, 1020-21 (6th Cir. 1992); *Terrell v. University of Texas Sys. Police*, 792 F.2d 1360, 1361-62 (5th Cir. 1986), or speaking without any intent to comment publicly, *see Morris v. Crow*, 142 F.3d 1379, 1382-83 (11th Cir. 1998) (holding that a police officer's written report and court testimony pursuant to his job duties were unprotected because the speech could not be "characterized as an attempt to make public comment"); *Buazard v. Meredith*, 172 F.3d 546, 548 (8th Cir. 1999). In other words, this caselaw addresses the speaker's status only insofar as it relates to the context and purpose of the speech.

Some courts have explained that the relevant inquiry is whether the employee speaks more in his role "as employee" or "as citizen." *See, e.g., Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1050 (5th Cir. 1996). When courts refer to "speech as a citizen," it is shorthand for the constitutionally protected expression of personally-held views regarding a public concern. The underlying substantive question is whether the particular speech at issue constitutes the employee's own personal expression, intended as public comment, on a matter of public interest, rather than mere articulation of the employer's position or speech directed by a private grievance. When public employees offer their opinions in roles as representatives or employees of the government, the government's interest as an employer

is greater than if the speech comes divorced from the employment context, and the second prong of *Pickering* should honor that enhanced interest; however, the employee's speech may qualify as speech by a citizen on a public concern under the first prong of *Pickering* nonetheless. Indeed, we commonly have found speech by public employees spoken pursuant to their employment duties to constitute speech on a public concern. *See, e.g., Hulbert*, 120 F.3d at 653-54; *Campbell v. Towse*, 99 F.3d 820, 828 (7th Cir. 1996); *Wright v. Illinois Dep't of Children & Fam. Servs.*, 40 F.3d 1492, 1503 (7th Cir. 1994). As *Connick* instructs, we consider the content, context and purpose of Bonds's speech at the forum as factors in deciding that his speech touched on a matter of public concern. *See Connick*, 461 U.S. at 147; *Waters v. Churchill*, 511 U.S. 661, 668 (1994) (analyzing "what the speech was, in what tone it was delivered, what the listener's reactions were" in deciding whether the speech regarded a matter of public concern).

Even though he participated in the forum at Alderman Gordon's direction, Bonds articulated many independent views about the NSPP and did not serve as a mere surrogate for Council positions. Gordon testified that Bonds spoke for himself at the forum and that Bonds's criticisms of the NSPP and the Mayor went well beyond the scope of Gordon's instructions. Indeed, this personal initiative is precisely that which troubled Ordinans and the Board of Supervisors. Bonds spoke his own mind about the wisdom underlying the NSPP, how the NSPP would affect the lives of Milwaukee citizens and how concerned citizens ought to respond politically. Bonds satisfies the first prong of the *Pickering* test because he commented for himself on a topic of public concern.

The second prong of *Pickering* presents the thornier question whether Bonds's First Amendment interests outweighed the County's interests in government efficiency and workplace harmony. Factors to consider in applying the *Pickering* test include (1) whether the speech would

create problems in maintaining discipline or harmony among co-workers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to perform her responsibilities; (4) the time, place and manner of the speech; (5) the context in which the underlying dispute arose; (6) whether the matter was one on which debate was vital to informed decisionmaking; and (7) whether the speaker should be regarded as a member of the general public. *See Kokkinis v. Ivkovich*, 185 F.3d 840, 845 (7th Cir. 1999); *Wright*, 40 F.3d at 1502; *Knapp v. Whitaker*, 757 F.2d 827, 839 (7th Cir. 1985).

As the County stresses, Bonds appeared at the forum within the scope of his responsibilities to the City and otherwise would not have spoken there at all. This fact tempers his First Amendment interests. If Bonds had appeared simply as a surrogate for the City and said nothing on his own behalf, then his speech would be unprotected because his personal freedom of expression would not be implicated. *See, e.g., Bausworth v. Hazelwood Sch. Dist.*, 986 F.2d 1197, 1199 (8th Cir. 1993). However, in addition to representing the City, Bonds expressed his personal views about the NSPP at a community forum for open discussion, and personal views on a public concern are protected speech under *Pickering*. Furthermore, putting aside for a moment the costs and disruption caused by disclosure of sensitive government information, the public employee's opinions have particular First Amendment value for the public because his access to inside information places him in a unique position to evaluate government performance. *See Waters*, 511 U.S. at 674; *Wilbur*, 3 F.3d at 215. Bonds provided a unique perspective on the NSPP and contributed to meaningful public debate with his expert opinion on an arcane, but important City program which he had studied and researched.

This indicates that Bonds's First Amendment interests were significant, but not that they necessarily outweigh the government's interests here. In fact, we find the opposite to be true. Under *Pickering*, we consider among other things whether the speech would create workplace dissension; whether the employment relationship requires heightened personal loyalty and confidence; and whether the speech impedes the employee's ability to perform his responsibilities. *See Wright*, 40 F.3d at 1502. Bonds's status as a policymaking employee speaks to each of these factors and swings the balance in the County's favor. The special loyalty and confidentiality needed from policymaking employees like Bonds exacerbates the damage to the employment relationship and government effectiveness caused by their insubordinate, disloyal or inappropriate speech.

Although the policymaking employee exception does not apply, an employee's policymaking status therefore remains a critical factor in applying *Pickering* balancing. The policymaking employee exception represents a subset of *Pickering* cases where the government's interests so far outweigh the policymaking employee's interests that a categorical exception is appropriate. *See Warzon*, 60 F.3d at 1238; *Marshall*, 32 F.3d at 1220; *Wilbur*, 3 F.3d at 218-19. *But see Stough v. Gallagher*, 967 F.2d 1523, 1527-28 (11th Cir. 1992). The government interests advanced both by the policymaking employee exception and *Pickering* balancing overlap considerably. *See Warzon*, 60 F.3d at 1238. Under the same rationale embodied by the policymaking employee exception itself, the government employer possesses substantial latitude to punish or terminate (or in this case, refuse to hire) policymaking employees when addressing their nonpolitical speech under *Pickering*.

The difference for nonpolitical speech, however, is that the policymaking employee still retains some First Amendment rights despite his policymaking status. We have explained that "[b]ecause the individual and govern-

mental interests are essentially unvarying in patronage cases, the focus is less on the expressive activity than on the office occupied by the person engaging in that activity." *Heideman v. Wirsing*, 7 F.3d 659, 662 (7th Cir. 1993). In contrast, the connection between an instance of nonpolitical speech and the consequent effect on government efficiency varies considerably from one case to another. Evaluating the rich diversity of nonpolitical speech by policymaking employees under *Pickering* forces courts to accord First Amendment protection for speech that bears almost no relation to the demands required of policymaking employees, but permits the government appropriate latitude when the relevant speech will significantly impair the government's legitimate interests as an employer. We confer substantial weight to the employee's status as policymaker in applying *Pickering* to nonpolitical speech, but we also evaluate whether the employer proffers a reasonable connection between the speech and a legitimate rationale for the adverse employment action.

Bonds's speech rightly troubled the County because it had undermined his credibility with several supervisors, and Ordinans reasonably believed that his hiring would have created workplace dissension. Even though Bonds was not speaking about politics directly relevant to the County, Ordinans was concerned that Bonds would not be loyal to County policy positions because he had shown himself willing to advocate publicly his personal political views to the extent that he embarrassed his employer in explicit and provocative terms. Ordinans worried that Bonds might do the same while working for the Board of Supervisors and felt that his statements revealed him to be untrustworthy and disloyal—so much that several supervisors already had declared that they could not work with him. Particularly given the small size of the County staff, Ordinans was concerned that Bonds would disrupt workplace harmony and would be ineffective in his new position with the County as a result of the distrust surrounding him. In hiring or terminating employees, a gov-

ernment employer is entitled to consider "'the *potential* disruptiveness of an employee's speech.'" *Caruso v. De Luca*, 81 F.3d 666, 670-71 (7th Cir. 1996) (quoting *Waters*, 511 U.S. at 680); *see also Kokkinis*, 185 F.3d at 845-46 (upholding termination of a police officer who publicly criticized his employer, based on potential disruptiveness of speech). Furthermore, though Bonds contends otherwise, Ordinans had reasonable grounds to believe that Bonds had conducted himself inappropriately at the forum based on the newspaper report, Hart's telephone discussion with Bonds and Bonds's written apologies to Mayor Norquist and the Council.

After considering the views of three county supervisors and her chief of staff, Ordinans concluded that hiring Bonds would become a "big problem" and a "disaster." Under these circumstances, the County's interests in government efficiency and workplace harmony justified its decision to rescind its offer to Bonds for a policymaking position and outweighed Bonds's First Amendment interests under *Pickering*. The alternative for the County was to hire a prospective employee for a sensitive policymaking position who it believed would be disruptive and ineffective in his new role. The County's decision not to hire Bonds because of his speech at the July 26 forum meets the *Pickering* standard and does not violate the First Amendment.

Finally, Bonds argues that the County's interests as an employer were not yet implicated because he had not begun working for the County. This is material only if it affects how the County rightfully could have regarded the possible effect of Bonds's hiring on efficient government operation. Admittedly, these facts are unusual, but we disagree with Bonds that this makes any difference. Courts should give substantial deference to government predictions of harm from employee speech, *see Waters*, 511 U.S. at 673, and the Supreme Court explained that the government's reasoning for termination based on an employee's speech should be evaluated from the vantage of

the employer's reasonable belief. *See Waters*, 511 U.S. at 678; *see also Connick*, 461 U.S. at 152 ("[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."). The operative question is whether the County can show that it was reasonable to believe that Bonds's speech would cause dissension and inefficiency in its workplace once Bonds began work. As we have discussed already, the evidence shows this to be true here.

Ordinans premised her decision not to hire Bonds on the expected future effect that Bonds's hiring and presence in the workplace would have on office morale and government effectiveness. Ordinans reasonably felt that, if Bonds was hired, the other staffers would resent Bonds's lack of professionalism, and Hart testified that Bonds would have begun his employment at the County under a cloud of suspicion and distrust. Although Bonds had not started his employment with the County, Ordinans was justifiably concerned about the future tumult and dissension that Bonds's hiring would produce. These are legitimate interests under *Pickering,* and the fact that Bonds had not yet begun working at the County does not diminish them.

CONCLUSION

For the foregoing reasons, we AFFIRM the judgment for Milwaukee County.

CUDAHY, *Circuit Judge*, dissenting. This is certainly a case of first impression, illustrating the confusion attendant on increasingly complex elaborations of the First Amendment rights of government employees. To somehow allay confusion, we must go back to first principles in search of an answer to the puzzle.

In that spirit I concur wholeheartedly with the majority that Mr. Bonds's comments at the ill-fated Community Brainstorming Conference addressed a subject of public concern and that therefore the analysis set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968), is appropriate. *See also Connick v. Myers*, 461 U.S. 138 (1983). That Bonds was a public employee and that he spoke on a subject within his purview as a policy analyst working for the City does not impair his rights as a citizen, so long as he expressed his own opinion on a subject that was of intense public interest. He was not complaining about the quality of the water in the office water cooler or some other "inside" matter pertaining to his working conditions, his relations with other employees or some other topic not of interest to the public at large. It may be symptomatic of the confusion that seems increasingly to be plaguing *Pickering*-type cases that the issue of public concern could even be raised here. Going back to first principles may mean looking at the *Pickering* case itself, where a high school teacher wrote a letter to the local newspaper highly critical of the way the Board of Education had handled certain bond issue proposals and its subsequent allocation of financial resources between the schools' educational and athletic programs. *See Pickering*, 391 U.S. at 565-67, 575-78. In many respects, including the tone of the letter as compared with the tone of Mr. Bonds's public remarks, *Pickering* sounds very much like the present case.

Before wrestling with the thorny legal issues, it would be helpful to put the Brainstorming Conference, at which Mr. Bonds spoke, in some perspective. This will help not only in evaluating Mr. Bonds's conduct, but also in weigh-

ing the importance to the public of protecting his right to speak. Mr. Bonds's speech dealt with a highly controversial issue with millions of dollars of public funds at stake. Holding a doctoral degree in Urban Studies (and having written his dissertation on the historical distribution of Community Development Block Grant funds in Milwaukee from 1975 to 1997), he is a foremost expert on the Community Development Block Grant process and he obviously felt deeply about it. He was therefore highly qualified to provide the public with information about this important subject, which was right at the center of public concern. The testimony of Vel Phillips—who was Milwaukee's first black, female alderman, later Wisconsin Secretary of State and a national figure—and of Reuben Harpole—long associated with higher education through the University of Wisconsin-Milwaukee—indicate the importance of Mr. Bonds's speech. These were the only trial witnesses who were actually present at the forum where Mr. Bonds spoke, and when asked to describe Mr. Bonds's demeanor at the forum, Mr. Harpole answered, "[His demeanor was] [a]lmost essentially like he acted today [at the trial]. I've known Mr. Bond [sic] for about ten years and he's always been even tempered, just . . . but he doesn't bite his tongue on the truth." Tr. at 138. *See also id.* at 137 (Harpole characterizing Bonds's comments as "[s]mooth, nonthreatening, but speaking the truth").

Ms. Phillips's response to a question about what actions Mr. Bonds had advocated at the forum is instructive. She said, "I was very aware at that point and he was not advocating anything. He was being very . . . He's a soft spoken man just by his general demeanor and he was not in any way excited or . . . well, he was just being very logical, very professional in his responses." Tr. at 143. According to these witnesses, Mr. Bonds's allegedly inflammatory remarks about recalling the Mayor and so on were not volunteered. They were offered in response to questions from the audience about what steps citizens could take if they disagreed with decisions about the Neigh-

borhood Strategic Planning Process. *See, e.g.*, Tr. at 143 (Phillips explaining that "someone asked the question what are some of the options if you think you're not getting your fair share . . . . And [Bonds] was going through various things that you could do . . .").

With this indication of how the actual witnesses may have seen the speech, it is easier to strike the *Pickering* balance in a realistic way and without the credulity displayed by the majority. For, in the majority's analysis, County officials are being allowed to speculate about Bonds's future suitability for County employment with neither logic nor evidence to support their speculations. The first paradox is that Bonds was retained by the City which he supposedly grossly offended by his remarks. Neither his loyalty nor his ability to work cooperatively with his fellows has been questioned by the City. Yet the County, which he has not offended in any way, can wring its hands over Bonds's supposed disloyalty and disruptiveness. After the withdrawal of County employment, the City did not discipline or reprimand (let alone fire) Mr. Bonds. Instead, the City continued to employ him. He went on providing critical analysis for the City, and ultimately the Community Development Policy Committee and the full council accepted his concerns and modified the Neighborhood Strategic Planning Process. *See* Tr. at 18-19, 93-95, 221. Mr. Bonds was later promoted, receiving a $9,000 pay raise, and praised by City officials. *See* Tr. at 41-42, 45, 48, 222. His views were essentially vindicated but at the cost of a County job. On the other side of the scale, the majority says very little about the interest of Mr. Bonds, as a citizen, in being able to speak honestly in public about a significant matter of public concern or about the public's interest in being informed by him about a difficult matter of major importance to the public. *See Pickering*, 391 U.S. at 571-72.

Perhaps, on this occasion Bonds's passionate belief in his point of view caused him to speak too boldly and imprudently, but there is no showing that this has been

Mr. Bonds's habit as an employee of the City or that it would be his practice at the County, where he had been specifically instructed that analysts assume a low profile. There is nothing to indicate that the City ever issued similar instructions, and, in fact, Bonds's boss, Alderman Gordon, *directed* him to participate in the forum. *See* Tr. at 27-28. Later on, the Alderman claimed in a deposition that he had received numerous telephone calls of protest at Bonds's remarks, and the findings of fact submitted by the defendants, and adopted without change by the district court, translated this as "substantial disruption" for the City. *See* Defendant's Proposed Findings of Fact ¶ 13; Tr. of Decision at 5 (adopting findings). There were also findings about apologies requested or delivered. *See* Findings of Fact ¶¶ 11, 12. Whether there were "apologies" requested or delivered seems of only marginal relevance. If Bonds apologized for any misunderstandings or perceived excesses of rhetoric, it would speak well for his civility, but it says little about the propriety or legality of his being "unhired" by the County. The best indicator of the City's "disruption" as a result of the Bonds incident is that Bonds was not reprimanded or sanctioned by the City in any way.

The majority has in its analysis ushered the policymaking employee exception, as such, out the front door, but has let it in again by the back door—using it as a makeweight of undetermined heft in the *Pickering* analysis. Thus, the majority writes, "The special loyalty and confidentiality needed from policymaking employees like Bonds exacerbates the damage to the employment relationship and government effectiveness caused by their insubordinate, disloyal or inappropriate speech." Maj. op., *supra*, at 18. Bonds's speech here may have been "inappropriate" in part, but it was surely neither insubordinate nor disloyal. Bonds was directed by his boss to appear at the Brainstorming Conference, and pointing out the means of political action does not equate with "disloyalty." The majority ascribes to Chairman Karen Ordinans con-

cerns that Bonds's "statements revealed him to be untrustworthy and disloyal." Maj. op., *supra*, at 19. All of this seems to assume that after the council vote (which went against Alderman Gordon), Bonds should have changed his tune and supported a change that both he and the Alderman had opposed, or be deemed "disloyal."

Three County supervisors—Daniel Dilberti, Jim McGuigan and Robert Krug—expressed concern about Bonds when they read the piece in the *Journal Sentinel*. *See* Maj op., *supra*, at 4-5. But, there was opposition to Bonds's termination: five Board members sent Ordinans a letter formally opposing the termination, *see* Tr. at 210-11, and four supervisors testified on Bonds's behalf at the trial, *see* Tr. at 97-100 (Lori A. Lutzka), 110-19 (Elizabeth Cogg-Jones), 119-130 (James Gavin White), 130-34 (Michael Mayo, Sr.). I suppose this renders Bonds "controversial" and, by the lights of some, sanctionable for his speech. However, I would guess that several (perhaps all) members of the Board of Education were upset at teacher Pickering for writing a "disruptive" letter to the newspaper. This should never be a sufficient reason for denying First Amendment protection.

The fundamental error that I see in the majority's analysis is in taking the expressed concerns of County officials at face value without requiring some showing that subjective concerns were supported by objective reality. Thus, the majority writes, "Bonds's speech rightly troubled the County because it had undermined his credibility with several supervisors, and Ordinans reasonably believed that his hiring would have created workplace dissension." Maj. op., *supra*, at 19. "Loss of credibility" is a pointedly subjective matter, and there are obvious problems with allowing it to vitiate constitutional rights. Freedom of speech would mean very little if one's "credibility" with the listeners were the measure of one's rights. And the majority inexplicably describes as "reasonable" Ordinans's concerns about "workplace dissension" which she based simply on what she thought Bonds's "future be-

havior could be." Tr. at 202. *Potential* problems may certainly figure in the *Pickering* analysis, but there must be some plausible link between what has happened in the real world and what might happen in the future. *See Connick*, 461 U.S. at 152 (noting that although there is no need for "an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest . . . a stronger showing may be necessary [to justify termination] if the employee's speech more substantially involved matters of public concern"). Here we have a single episode in which a speaker may have engaged in rhetorical excesses. This may indicate a too fervent commitment to a point of view, but it is pure speculation that "workplace dissension" is anywhere in sight. The majority theorizes that the small size of the County staff would contribute to bad working relations with Mr. Bonds. This is just a wild guess based on a single speech. In fact, because Bonds's comments were "in no way directed towards any person with whom [he] would normally be in contact in the course of his daily work" with the County, there is probably "no question of maintaining either discipline by immediate superiors or harmony among coworkers . . . ." *Pickering*, 391 U.S. at 569-70. Or, it might also be the case that the other County staffers would admire Bonds for his forthrightness and derive satisfaction from working with him. It is unlikely that failing to cancel Bonds's hiring would be a "disaster," on the theory that the County's seven-person research staff would go out in the community and conduct themselves like Bonds or that Ordinans's "job would be complete chaos." The remote possibility that other teachers might emulate Mr. Pickering in publicly critiquing Board of Education policy was no bar to First Amendment protection for him in the *Pickering* case. The lesson of the present incident as viewed by the majority is that staffers are to be seen and not heard and the knowledge they have acquired after many years of diligent application is not to be shared with a public eager to be

informed. They will exercise their First Amendment rights at their own (high) risk.

What was totally lacking in the Bonds case was any investigation to discover exactly in what context he made his remarks, what was his relation to Alderman Gordon, whether the Alderman directed him to make remarks on the Neighborhood Strategic Planning Process and a variety of other matters that might reflect on Bonds's alleged "insubordination" and "disruption." Ordinans did not speak with Bonds or Alderman Gordon, *see* Tr. at 210, nor did she speak with anyone who was actually at the Brainstorming Conference, *see* Tr. at 203. An investigation would have disclosed that there was no disagreement in policy between Bonds and his boss, the Alderman. Alderman Gordon, who represents a ward in the Northside African-American community and to whom Bonds directly reported, had instructed him to write the report on the Neighborhood Strategic Planning Process and had directed him to appear and to speak in his place at the Community Brainstorming Conference. *See* Tr. at 14-15, 19, 27. Alderman Gordon had told Bonds to provide "blunt" analysis of the Neighborhood Strategic Planning Process. Tr. at 28. The Northside audience before whom first Gordon and then Bonds was to appear was certainly expected to be sympathetic to their views.

After the speech came to the attention of Ordinans, Bonds should have been given an opportunity to tell his side of the story in detail. He did have one telephone conversation with Hart, but that seems entirely inadequate under the circumstances. If Bonds were being dropped by the City, you can be sure there would have been at the very least a thorough investigation. I see no difference between the obligation to investigate of an employer where the term of employment has yet to begin and the obligation of a current employer. In fact, at the trial, Milwaukee Common Council President Kalwitz was asked what he would have done if he were concerned about Bonds's speech. Alderman Kalwitz replied, "I would have ap-

proached Mr. Bonds and asked him under what circumstances he made those comments." Tr. at 222. The alternative to an investigation is to give full credence to every fleeting concern and every vagrant fear felt by officials of the prospective employer when they have read a brief account of an incident in the newspaper. If nothing is required of the prospective employer beyond rampant speculation, the burden on First Amendment rights is unacceptable.

And what are the First Amendment values that are virtually ignored by the majority opinion? As has been earlier explained, Bonds's speech involved a highly controversial subject in which there was intense public interest—particularly on the Northside of Milwaukee. Millions of dollars were at stake, and Bonds was an expert who could supply the pressing need for information. One obvious purpose of the First Amendment is to keep the public informed on important subjects of public concern. *See Pickering*, 391 U.S. at 571-72. The result reached by the majority here will put new barriers in the path of government employees who might otherwise contribute to public enlightenment. One of the ironies of the situation is that, after being rejected by the County, Bonds went on to essentially vindicate his views in his further work for the City. The employer that did not strike out in panic at the first manifestation of Bonds's independence was thus rewarded by his further, apparently fruitful, contributions of skill and knowledge. That is why the interests both of the government employee and of the public in the employee's right to speak freely on matters of public concern may not be circumscribed on the basis of speculative and baseless fears.

Although the majority did not apply the policymaking employee exception here because it concluded that the County did not reject Bonds because of a political disagreement, a few comments on its extended discussion of the exception may be in order. It is important to recall the origins of the exception in determining whether it ought

to apply. In its origins, the exception pertained to partisan differences: Republicans should not be forced to employ Democratic policymakers. *See Elrod v. Burns*, 427 U.S. 347, 372 (1976); *see also Branti v. Finkel*, 445 U.S. 507 (1980). From there it moved on to situations of electoral confrontation: a candidate should not have to employ his or her election opponent as a policymaker. *See Wilbur v. Mahan*, 3 F.3d 214, 217-18 (7th Cir. 1993). More recently, the exception has been extended to the taking of policy (or political) positions by a policymaker in opposition to those of his or her employer. *See Warzon v. Drew*, 60 F.3d 1234, 1239 (7th Cir. 1995). These are thought of as political differences of sufficient consequence to undermine the employer-employee relation of trust and confidence. This doctrine, however, in its evolution rests upon the idea—not that there is a simple disagreement on an issue between employer and employee—but that the disagreement is fundamental enough to weaken the bond between the two, so as to destroy the efficiency and effectiveness of the working relationship. The policy difference can then be said to be a "political" rift between a public employer and its policymaking employee. As the majority puts it, "disagreement between the employer and the policymaking employee over job-related policy issues [may cause] the same failure of loyalty and shared political mission between superior and subordinate as inconsistent political affiliation or viewpoint." Maj. op., *supra*, at 12. This formulation should make it clear that the disagreement, in order to implicate the policymaking employee exception, must take a form from which a failure of loyalty and fidelity can reasonably be inferred as a strong probability, not a form from which such a failure would be only a possibility—something to watch for in the future.

In the present context, the exception does not apply for several reasons in addition to the one noted by the majority. First, Mr. Bonds had *no* policy disagreement with his relevant superior, Alderman Gordon. They both agreed that The Neighborhood Strategic Planning Process was a

bad idea. Admittedly, the Common Council acted contrary to Alderman Gordon's wishes and contrary to Mr. Bonds's views, but this is hardly a policy difference that is relevant to Mr. Bonds's ability to perform his policymaking job. That Alderman Gordon was critical of Mr. Bonds's rhetoric (as opposed to the substance of his remarks) creates no *policy* difference implicating the policymaking employee exception.

There is another reason why the exception fails here. The basis of the policymaking exception is the idea that political antagonism may cast a doubt over the employee's fidelity and ability to work cooperatively and effectively in the policymaking role. If a single speech were enough to trigger the exception, the exception would completely swallow any First Amendment protection that would otherwise be available. It is not surprising that in none of our cases has a single incident of policy disagreement been held to be enough to justify the sanctioning of a policymaker. And this is certainly not the case to recognize such a possibility.

There was therefore no basis either under the policymaking employee exception or under *Pickering* balancing for the County to rescind Bonds's job. I therefore respectfully dissent.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 23, 2000

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

MICHAEL BONDS,

Plaintiff-Appellant,

No. 99-2282 v.

MILWAUKEE COUNTY, KAREN ORDINANS, WILLIAM HART and THOMAS KUZMA,

Defendants-Appellees.

ORDER

On consideration of the petition for rehearing and rehearing *en banc* filed by the plaintiff-appellant, and the answer of the defendants-appellees, a vote of the members of the court authorized to vote was requested and a majority of those judges have voted to deny rehearing *en banc.** A majority of the judges on the original panel have voted to deny the petition for rehearing.** Accordingly,

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* Judges Rovner, Diane P. Wood and Williams voted to grant the petition for rehearing *en banc.*

** Judge Cudahy voted to grant the petition for rehearing.

IT IS ORDERED that the aforesaid petition for rehearing and rehearing *en banc* be, and the same are hereby, DENIED.

[Dated April 16, 1999]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

MICHAEL BONDS, individually,

Plaintiff,

v. Case No. 97-C-0921

MILWAUKEE COUNTY,

Defendant.

DEFENDANT MILWAUKEE COUNTY'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant Milwaukee County submits the following proposed findings of fact and conclusions of law with respect to the trial in this matter scheduled for April 19 and 20, 1999. Listed below each proposed finding is the evidence which Milwaukee County believes will support the finding.

PROPOSED FINDINGS OF FACT

1. When Michael Bonds spoke at the Community Brainstorming Forum on July 26, 1997, he was speaking in his capacity as an employee of the City of Milwaukee.

– Bonds' testimony.

– Bonds' deposition testimony (trial exhibit 39, pp. 59-60).

– Bonds' Affidavit (trial exhibit 40, 11 13).

– Forum Agenda listing Bonds as "Community Development Policy Committee Analyst" (trial exhibit 9).

2. Michael Bonds appeared at the July 26, 1997 Brainstorming Forum at the request of Alderman Gordon.

– Bonds' testimony.

– Bonds' deposition testimony (trial exhibit 39, pp. 59-60).

– Gordon testimony.

– Bonds' Affidavit (trial exhibit 40, ¶ 13).

3. Had Alderman Gordon not requested Bonds to attend the Brainstorming Forum, Bonds would have had no reason to be there.

– Bonds' testimony.

– Bonds' deposition testimony (trial exhibit 39, p. 60).

4. The position of Policy Research Analyst for Milwaukee County is one in which personal loyalty and confidence are necessary.

– Testimony of Diliberti, McGuigan, Krug, Ordinans and Hart.

– Position descriptions (trial exhibits 34, 36).

5. The position of Policy Research Analyst with Milwaukee County is one in which the employee has meaningful input into government decision making on issues where there is room for principled disagreement on goals or their implementation.

– Testimony of Diliberti, McGuigan, Krug, Ordinans and Hart.

– Position descriptions (trial exhibits 34, 36).

6. On July 25, 1997, plaintiff Michael Bonds accepted a job offer from Milwaukee County for the position of Policy Research Analyst for the Milwaukee County Board of Supervisors.

– Bonds and Ordinans' testimony.

– Trial Exhibits 1 and 2.

7. Michael Bonds' employment with Milwaukee County was to commence on August 11, 1997, and his employment as a Community Development Policy Committee ("CDPC") Fiscal Analyst-Senior with the City of Milwaukee was to expire on August 8, 1997.

– Bonds' testimony.

– Trial Exhibits 1, 2 and 3.

8. In his capacity as Fiscal Analyst-Senior, Michael Bonds was critical of a proposed Neighborhood Strategic Planning ("NSP") process which involved a change in the way community development block grants were allocated by the City.

– Bonds' testimony.

– Trial Exhibit 11.

9. On July 25, 1997, the Common Council of Milwaukee approved the grant allocation procedures included in the NSP process.

– Testimony of Bonds, Gordon and Kalwitz.

10. On July 26, 1997, at the Community Brainstorming Forum, Michael Bonds was very critical of the Common Council's decision to change the grant allocation procedures. As reported in a July 27, 1997 article in the Milwaukee Journal Sentinel, Michael Bonds stated, at various points during his presentation, as follows:

- He stated that the decision by the Common Council was "sinister."
- He stated: "Anyone who is concerned about racial harmony should be at City Hall raising hell."
- He called on any African-American serving on the block grant task force to resign at protest.
- He stated that if Mayor Norquist did not veto the decision by the Common Council, citizens could attempt to recall the Mayor.

– Testimony of Bonds, Figueroa and others in attendance at the Brainstorming Forum.

– Milwaukee Journal Sentinel article (trial exhibit 10).

11. When Alderman Gordon read the newspaper article about Bonds' comments, he was very upset. He viewed the comments as inflammatory and inappropriate, and requested that Michael Bonds apologize for making the comments. Bonds apologized to Alderman Gordon.

– Gordon testimony.

– Gordon deposition testimony, pp. 31-33, 40-41, 45 (trial exhibit 41).

12. On Monday, July 28, 1999, Michael Bonds issued written apologies to the Mayor and to all members of the Milwaukee Common Council for his comments at the Community Brain Storming Forum.

– Trial Exhibits 17 and 18.

13. Michael Bonds' comments created a substantial disruption for the City of Milwaukee, and caused the City to engage in "damage control" by distancing itself from the comments made by Bonds.

– Gordon testimony.

– Gordon deposition testimony, pp. 37-38 (trial exhibit 41).

14. On Monday morning, July 28, 1997, William Hart, Chief of Staff to Chairman Ordinans, called Michael Bonds to discuss the newspaper article. Mr. Bonds informed Mr. Hart that several of his comments were taken out of context, but he did not deny that he made any of the reported comments in the newspaper. Mr. Hart reported Mr. Bonds' comments to Karen Ordinans when she returned from vacation on July 29, 1997.

– Hart testimony.

15. Karen Ordinans, as Chairman of the Milwaukee County Board of Supervisors, had the authority to hire and fire all Policy Research Analysts.

– Ordinans testimony.

16. When County Board Chairman Karen Ordinans returned from a vacation on July 29, 1997, she had messages on her home answering machine from Supervisors Daniel Diliberti and James McGuigan, both of whom objected to the hiring of Michael Bonds in light of the comments he made at the Community Brainstorming Forum.

– Testimony of Ordinans, Diliberti and McGuigan.

17. When Karen Ordinans read the article reporting on the comments by Bonds, she was very upset. She objected to the fact that Bonds, while employed by the City, was publicly criticizing a decision by the City of Milwaukee Common Council; she was upset that Michael Bonds was portraying the Community Development Block Grant issue in such a way as to exacerbate tension between the north and south sides of the City; she was upset with the lack of professionalism and discretion which were evident in the manner in which he publicly expressed his comments; and she was upset that Michael Bonds was speaking out publicly against a policy decision made by the Common Council after he had assured her during an interview that he understood that in his role as a research analyst he needed to accept the final decision made by the ultimate policymakers.

– Ordinans' testimony.

18. On July 30, 1997, Karen Ordinans called William Hart and informed him that she had decided not to hire Michael Bonds as a Policy Research Analyst. Her decision was based on a number of factors: (1) based upon comments to her by other supervisors, she believed that they would not be able to trust work performed by Mr.

Bonds or have any confidence in his professionalism, objectivity or discretion; (2) she did not want a research analyst who would be inclined to highlight the divisiveness between the various areas of Milwaukee County; (3) Milwaukee County also distributes community development block grant funds, and it was apparent that Bonds had pre-established priorities on this topic which would affect his objectivity; and (4) Bonds' conduct in publicly criticizing a decision by the Common Council and encouraging people upset about the decision to "raise hell" at City Hall, was directly contrary to statements which Bonds made to her during an interview for the Policy Research Analyst position.

– Ordinans' testimony.

19. Supervisor Diliberti objected to the hiring of Michael Bonds because his actions in speaking out against the Common Council vote, while still employed by the City, were inappropriate for a staff person, and indicated that Bonds would not be able to satisfactorily complete his job duties as a Policy Research Analyst. Supervisor Diliberti informed Mr. Hart that he would not serve on any County Committee that was staffed by Michael Bonds.

– Testimony of Diliberti and Hart.

20. Supervisor McGuigan objected to the hiring of Michael Bonds because of his concerns about having a research analyst willing to take a public and activist roll against the policymaking body where he was employed.

– McGuigan testimony.

21. Supervisor Robert Krug objected to the hiring of Michael Bonds because he did not believe that a staff

member should publicly advocate for one side or the other about a policy issue before the Board of Supervisors. He further believed it was inappropriate for Michael Bonds, while employed by the City of Milwaukee, to publicly criticize the Common Council and the Mayor.

– Krug testimony.

22. On July 31, 1997, after deciding to withdraw the offer to Bonds, Karen Ordinans contacted Common Council President John Kalwitz to determine whether Bonds could keep his position with the City of Milwaukee. Kalwitz informed Ordinans later that day that Bonds still had his job with the City.

– Testimony of Ordinans and Kalwitz.

PROPOSED CONCLUSIONS OF LAW

1. Under the *Pickering* balancing test, the court must first determine whether the employee's speech involved a matter of public concern. If it did, then the court must balance the interests of the employee in commenting on the subject against the government employer's interest in an efficient workplace. *Warzon v. Drew,* 60 F.3d 1234, 1238 (7th Cir. 1995), and *Waters v. Churchill,* 511 U.S. 661, 675 (1994) (plurality opinion).

2. The *Pickering* doctrine was designed to protect public employees speaking out *as citizens* on matters of public concern. *Connick v. Myers,* 461 U.S. 138, 143 (1983). When he spoke at the July 26, 1997 Community Brain Storming Forum, Michael Bonds was speaking in his capacity as an employee of the City of Milwaukee and not as a citizen. Under the first prong of the *Pickering*

analysis, "the First Amendment protects the right of a public employee ***as a citizen***, not as an employee, to speak on matters of public concern." *Marquez v. Turnock*, 765 F. Supp. 1376, 1385 (C.D. Ill. 1991), *aff'd*, 967 F.2d 1175 (7th Cir. 1992). *See also Urofsky v. Gilmore*, 167 F.3d 191, 195-96 (4th Cir. 1999); *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1051 (5th Cir. 1996); *Thomson v. Scheid*, 977 F.2d 1017, 1020 (6th Cir. 1992), *cert. denied*, 508 U.S. 910 (1993); *Youker v. Schoenenberger*, 22 F.3d 163, 166-67 (7th Cir. 1994); *Buazard v. Meredith*, 1999 WL 177445, at *2 (8th Cir. March 30, 1999); *David v. City and County of Denver*, 101 F.3d 1344, 1355-56 (10th Cir. 1996), *cert. denied*, 139 L.Ed2d 102 (1997); *Morris v. Crow*, 142 F.3d 1379, 1381-82 (11th Cir. 1998); *Bartley v. Thompson*, 198 Wis. 2d 323, 542 N.W.2d 227 (Ct. App. 1995), *rev. denied*, 546 N.W.2d 469, *cert. denied*, 517 U.S. 1210 (1996). *Cf. Kincade v. City of Blue Springs*, 64 F.3d 389, 396 (8th Cir. 1995), *cert. denied*, 517 U.S. 1166 (1996). Thus, plaintiff's case fails under the first prong of *Pickering*.

3. With regard to the second prong of the *Pickering* analysis, the balancing of interests, factors to consider in deciding the extent to which an employer legitimately may take adverse employment action include (1) the effect of the employee's conduct on discipline and harmony among co-workers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to competently perform his daily duties; (4) the time, place, and manner of the speech; (5) the context in which the underlying dispute arose; (6) whether the matter was one on which debate was vital to

informed decision making; and (7) whether the speaker should be regarded as a member of the general public. *Wright v. Illinois Dep't of Children & Family Servs.*, 40 F.3d 1492, 1502 (7th Cir. 1994).

4. Any interest that Michael Bonds had in speaking at the Community Brain Storming Forum was outweighed by Milwaukee County's interest in maintaining efficiency and avoiding disruption in the workplace. The plaintiff's First Amendment claim thus fails under both prongs of *Pickering*.

4. Under the "policymaker" exception, a governmental employer may take adverse employment action against a policymaking employee for political reasons, without violating the First Amendment. *Marshall v. Porter County Plan Comm'n*, 32 F.3d 1215, 1221 (7th Cir. 1994).

5. The position of Policy Research Analyst for the Milwaukee County Board of Supervisors was a "policymaking" position, because it authorizes, either directly or indirectly, meaningful input into government decision making on issues where there is room for principled disagreement on goals or their implementation. *Nekolny v. Painter*, 653 F.2d 1164, 1170 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982); *Warzon*, 60 F.3d at 1239.

6. Milwaukee County's decision to withdraw its offer of employment to Michael Bonds was based upon political grounds, namely: (1) Chairman Ordinans' objected to Bonds' attempts to exacerbate the divisiveness between the North and South sides of the City; (2) Ordinans was responding to objections by other Supervisors whom she represented as Chairman of the County Board; (3) Chairman Ordinans was concerned about hiring a re-

search analyst who would publicly criticize the Board of Supervisors or individual Supervisors if they adopted policy with which he disagreed. Milwaukee County's actions therefore did not violate the First Amendment.

7. Milwaukee County's actions in withdrawing its offer of employment to Michael Bonds in response to his speech at the Community Brain Storming Forum did not violate the First Amendment.

Dated at Milwaukee, Wisconsin, this 16th day of April, 1999.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MICHAEL BONDS

JUDGMENT IN A CIVIL CASE

v.

CASE NUMBER: 97-C-921

MILWAUKEE COUNTY

COURT DECISION. This action came before the Court for a bench trial on plaintiff's claims against the remaining defendant Milwaukee County. The issues having been tried and the Court having rendered its decision in open court this date.

IT IS ORDERED AND ADJUDGED that plaintiff has and recovers nothing on his claim against Milwaukee County; and,

IT IS FURTHER ORDERED AND ADJUDGED that this action be and the same is herewith DISMISSED on its merits together with costs as taxed by the Clerk of Court.

APPROVED: /s/ J. P. Stadtmueller
Chief Judge

April 20, 1999
Date

SOFRON B. NEDILSKY
Clerk

/s/ Patricia K. Blackburn
(By) Deputy Clerk

Supreme Court, U.S.
FILED
SEP 11 2000
CLERK

No. 00-226

In The

Supreme Court of the United States

MICHAEL BONDS,

Petitioner,

v.

MILWAUKEE COUNTY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

In 1997, Michael Bonds applied for the position of Policy Research Analyst for the Milwaukee County Board of Supervisors. As Bonds has conceded, the research analyst position is a "policymaking" position as defined by the federal courts, meaning there is a heightened need for trust, confidence and loyalty in such employees. During his interview with County Board Chairman Karen Ordinans, Bonds stated that he understood the role of a research analyst, and that "he knew that whether he agreed or disagreed with a decision made by the County Board, that it was not his place to publicly comment on it or get into it." *Bonds v. Milwaukee County*, 207 F.3d 969, 974 (7th Cir. 2000) (App. 3). Bonds was offered the position, and accepted on July 25, 1997. He was scheduled to commence work at Milwaukee County on August 11, 1997.

At the time, Bonds was working for the City of Milwaukee as a senior fiscal analyst for the City's Community Development Block Grant Committee. On July 25, 1997 (the same day Bonds accepted the Milwaukee County position), the City of Milwaukee Common Council adopted a new method of distributing community development block grant funds (the "NSPP"), of which Bonds had been highly critical in his position as an analyst. The following day, July 26, 1997, Bonds appeared at a public forum and harshly criticized the Common Council's decision, characterizing the NSPP as "sinister," suggesting opponents should be "raising hell" at City Hall, and suggesting a possible recall of the Mayor if the plan was not vetoed. *Bonds*, 207 F.3d at 974 (App. 3-4). Bonds' comments were reported the following day on the

front page of the Metro section of the Milwaukee Journal Sentinel, Milwaukee's major daily newspaper.

As found by both lower courts, Bonds' comments "sparked immediate outrage at Milwaukee County." *Id.* at 974-75 (App. 4-5); (R-App. 10-11).[1] Three Supervisors objected to Bonds' hiring and indicated a reluctance to work with him. Chairman Ordinans was "very shocked" by Bonds' conduct. She had "hired Bonds for the trusted analyst position believing that Bonds would be discreet and reserve his personal misgivings from public attention." *Id.* at 975 (App. 5). When Ordinans' Chief of Staff William Hart called Bonds to investigate the matter, Bonds admitted that the "main thrust" of the newspaper article was correct. Bonds then faxed to Hart copies of apologies he was sending that day to Mayor John O. Norquist and the Milwaukee Common Council.

In light of the strong objections of several County Supervisors, and her own misgivings about Bonds' loyalty and trustworthiness, Chairman Ordinans concluded that hiring Bonds would be a "disaster." After determining that Bonds could keep his City position, Ordinans withdrew Bonds' job offer with the County.

---

[1] Contrary to Supreme Court Rule 14(1)(i), Petitioner's Appendix did not include the transcript of the District Court's April 20, 1999 oral decision granting judgment to Milwaukee County. For the Court's convenience, a copy of that transcript is appended to this response brief as "R-App."

REASONS FOR DENYING THE WRIT

Bonds attempts to cast the Seventh Circuit's decision as mandating a "categorical" approach when a policymaking employee is involved in a *Pickering* balancing analysis. The plain language of the opinion belies this assertion; the Seventh Circuit properly applied the balancing analysis of *Pickering v. Bd. of Education*, 391 U.S. 563 (1968), noting that an employee's "policymaking" status weighs on the government's side of the scale because of the heightened need for loyalty and confidentiality from such employees.

The real thrust of the Petition is that the lower courts misapplied the facts when they concluded that Milwaukee County reasonably believed that hiring Bonds would be disruptive. Generally, the Court will not grant a petition for certiorari on these grounds. In addition, Bonds misstates or ignores crucial facts in presenting his argument.

I.

THE PETITION MISSTATES OR IGNORES CRITICAL FACTS FOUND BY THE LOWER COURTS

Bonds contends that when he spoke at the Community Brain Storming forum on July 26, 1997, he "did exactly what his boss, Alderman Gordon, asked and expected him to do." *Pet.* at 7. This assertion, repeated throughout the Petition, *Pet.* at 19, 23, 27 and 28, was expressly rejected by the Court of Appeals:

> To begin, we address Bonds' challenge to the following district court findings of fact: (1)

> Bonds's comments created substantial disruption for the City; (2) Alderman Gordon viewed Bonds's comments as inflammatory and inappropriate and requested an apology from Bonds . . .
>
> Bonds contends that [these] findings are unsupported by the record, but both derived directly from the deposition testimony of Alderman Gordon. Gordon explained unequivocally in his deposition that Bonds' comments were absolutely inappropriate and sparked a "firestorm" of outrage that besieged him with phone calls for several days. Although Gordon did not testify that he demanded an apology, Gordon asked Bonds to explain himself, and Bonds immediately apologized for his remarks at the forum.

Bonds, 207 F.3d at 976 (App. 7-8).

Bonds also suggests that Milwaukee County engaged in little or no investigation, and that there were no reasonable bases for Milwaukee County's decision to withdraw the job offer. *Pet.* at 8, 26-29. Bonds fails to inform the Court about the apologies he sent to Mayor Norquist and the City of Milwaukee Common Council, which he faxed to Milwaukee County when it investigated his comments. Again, the Seventh Circuit rejected Bonds' challenge to these findings:

> Regarding the third finding of fact, Bonds argues that Bonds's letters to the Common Council and Mayor Norquist were not "apologies," but rather, clarifications of his comments at the July 26 forum. Bonds's private intent notwithstanding, the district court reviewed the letters and found that these letters, which express

> Bonds's regret for his conduct at the forum, constituted apologies to the Council and the Mayor. This was not clear error.

Bonds, 207 F.3d at 976 (App. 8).

II.

THE PRIMARY BASIS FOR THE PETITION IS THAT THE LOWER COURTS MADE ERRONEOUS FACTUAL FINDINGS AND MISAPPLIED THE LAW

As set forth in section III below, the Court of Appeals correctly stated the constitutional standards which control the *Pickering* analysis. Bonds simply disagrees with the application of those standards to the facts established at trial.

Rule 10 of the Supreme Court Rules states: "A Petition for a Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." According to Justice Holmes, the Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). This policy is applied with "particular rigor when the district court and court of appeals are in agreement as to what conclusion the record requires." *Kyles v. Whitley*, 514 U.S. 419, 456-57 (1995) (Scalia, J., Dissenting). Under this standard, the Petition should be denied.

A. The *Pickering* Balancing

Bonds asserts in section B of the Petition that the *Pickering* balancing "should have been decided in Bonds's

favor." *Pet.* at 13. Bonds attempts to analogize the facts of this case to the facts in *Pickering* arguing that, like Mr. Pickering, the balancing should weigh in his favor. In this manner, Bonds asserts that the Seventh Circuit's decision is "inconsistent with *Pickering*." *Pet.* at 15.

This misconstrues the most fundamental aspect of *Pickering*, which is that each case must be weighed upon its own facts. Citing the "enormous variety of fact situations in which critical statements by . . . public employees" may be thought to furnish grounds for dismissal, the Court did not "deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged." *Pickering*, 391 U.S. at 569. Lower courts are thus entrusted to apply the appropriate *Pickering* factors to the unique facts of each case. That is precisely what occurred here.

Moreover, this case is not factually analogous to *Pickering*. Milwaukee County presented evidence that Bonds had severely damaged the confidence and loyalty required for a research analyst. (App. 19-20). By contrast, in *Pickering*, "[n]o evidence was introduced at any point in the proceedings as to the effect of the publication of the letter on the community as a whole or on the administration of the school system in particular, and no specific findings along these lines were made." *Pickering*, 391 U.S. at 567.

B. The Reasonableness of Milwaukee County's Investigation

In section C of the Petition, Bonds argues that Milwaukee County did not conduct a "reasonable" investigation into the context of Bonds' speech, and that the County's "judgment" that hiring Bonds would be disruptive was based upon "rank speculation" and was "wrong." *Pet.* at 21-29.

This discussion amounts to little more than a mischaracterization of the evidence presented at trial and an assertion that the lower courts misconstrued the evidence. Contrary to Bonds' assertions, the County did not base its decision on "knee jerk" reactions or "gut feelings." *Pet.* at 28. The District Court and Court of Appeals carefully examined the evidence and concluded that the County presented compelling evidence of the reasonableness of its investigation and decision, including testimony that several County Supervisors were unwilling to work with Bonds, that Bonds' comments were directly contrary to prior statements he made to Chairman Ordinans during his job interview, that Bonds' comments caused a "firestorm" of outrage at the City, and that Bonds was forced to apologize to the Mayor and Common Council. *Bonds*, 207 F.3d at 982 (App. 19-20); (R-App. 10-11).

The bottom line, however, is that such arguments are, and were, properly addressed to the lower courts. Bonds' disagreement with their conclusion does not support the granting of certiorari.

III.

THE SEVENTH CIRCUIT CORRECTLY STATED THE LEGAL STANDARDS CONCERNING THE POLICYMAKER EXCEPTION AND THE *PICKERING* BALANCING ANALYSIS

A. An Employee's Status as a Policymaker Speaks Directly to the *Pickering* Factors Concerning the Government's Interest in Maintaining Efficiency and Avoiding Disruption.

Bonds is correct that this case involves the confluence of two lines of First Amendment jurisprudence: the *Elrod/Branti* line of cases, which establish that a "policymaking" employee can be disciplined based upon party affiliation; and the *Pickering* balancing analysis, which weighs the employee's interest in speaking on a matter of public concern against an employer's interest in promoting the efficiency of its public services. *See Elrod v. Burns*, 427 U.S. 347 (1976), *Branti v. Finkel*, 445 U.S. 507 (1980), and *Pickering v. Board of Education*, 391 U.S. 563 (1968). Bonds is wrong, however, in asserting that the Seventh Circuit grafted the "policymaker" exception onto the *Pickering* analysis, creating a "categorical" test by which a policymaking employee will always fail in a *Pickering* balancing analysis. *Pet.* at 11. In fact, the Seventh Circuit declined to apply the policymaker exception, but correctly concluded that the policymaking nature of Bonds' position speaks to the government employer's interests under the *Pickering* balancing analysis.

The Seventh Circuit began its analysis by expressly declining to apply the categorical "policymaker" exception to this case: "The policymaking employee exception

does not immunize public employer action unconnected to and unmotivated by the need for political loyalty." *Bonds*, 207 F.3d at 979 (App. 13). Concluding that "Bonds was not hired because county executives believed he was disloyal and indiscreet," the Court held these are not the type of "political" reasons warranting application of the policymaker exception. *Id.*[2]

The Seventh Circuit then conducted the *Pickering* balancing analysis. First, the Court found that Bonds' speech involved a matter of public concern.[3] The Court then considered the second prong of *Pickering*: whether Bonds' interest in speaking outweighed "the County's interest in government efficiency and workplace harmony." *Bonds*, 207 F.3d at 981 (App. 16). It was at this point the Court of Appeals held that the "policymaking" analysis became relevant to the balancing.

---

[2] Milwaukee County argued below that its reasons for withdrawing the job offer, including Chairman Ordinans' concerns about Bonds' loyalty and her objection to the racial divisiveness of Bonds' comments, were "political" in nature and warranted application of the policymaker exception under the reasoning of *Warzon v. Drew*, 60 F.3d 1234 (7th Cir. 1995).

[3] Milwaukee County conceded that the substance of Bonds' comments involved a matter of public concern, but argued that the first prong of *Pickering* requires that the employee be speaking in his or her role "as a citizen" rather than "as an employee." *See, e.g., Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1050 (5th Cir. 1996). The Seventh Circuit disagreed, concluding that the "as a citizen" language is "shorthand" for the expression of "personally held views regarding a public concern," and does not refer to whether the employee was speaking as part of his or her job. *Bonds*, 207 F.3d at 979-80 (App. 14-15).

As the Court of Appeals explained, *Pickering* requires the Court to consider, among other things, "whether the speech would create workplace dissension; whether the employment relationship requires heightened personal loyalty and confidence; and whether the speech impeded the employee's ability to perform his responsibilities." *Id.* at 981 (App. 18); *see also Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (setting forth these and other factors). The Seventh Circuit held that the policymaking nature of the position "speaks to each of these factors" because the "special loyalty and confidentiality" needed from such employees "exacerbates the damage to the employment relationship and government effectiveness caused by their insubordinate, disloyal or inappropriate speech." *Bonds*, 207 F.3d at 981 (App. 18).

This formulation of the controlling constitutional standards is wholly consistent with *Pickering* and its progeny, which specifically recognize that the nature of the plaintiff's position impacts upon the employer's interests. In *Pickering*, the Court discounted the government's interests because plaintiff's relationships with defendants did not require "personal loyalty and confidence." 391 U.S. at 570. In *Connick v. Myers*, 461 U.S. 138, 151-52 (1983), the Court emphasized that "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." Finally, in *Rankin*, the Court held that "pertinent considerations" in a *Pickering* balancing include whether the speech "has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary." 483 U.S. at 388.

B. The Seventh Circuit Correctly Held that Policymaking Employees Have Less First Amendment Protection than Non-Policymaking Employees.

Bonds complains that the Seventh Circuit created an unacceptable standard that "a public employee's free speech rights are inversely related to the value of the information that employee can impart to the public." *Pet.* at 12. According to Bonds, this violates the "core principle" expressed by the Court that the First Amendment should promote and facilitate "self government." *Id.* To the contrary, in *Rankin*, a case not cited by Bonds, the Court created the "inverse" standard of which Bonds complains:

> The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails. Where, as here, an employee serves no confidential, policy-making, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal.

Rankin, 483 U.S. at 390-91. This principle has been widely accepted by other Courts of Appeal. *See, e.g., McEvoy v. Spencer*, 124 F.3d 92, 103 (2d Cir. 1997) (" '[T]he more the employee's job requires confidentiality, policymaking, or public contact, the greater the state's interest in firing her for expression that offends her employer.' ") (citation omitted); *McVey v. Stacy*, 157 F.3d 271, 278 (4th Cir. 1998) (a policymaking employee "enjoys substantially less First Amendment protection than does a lower level employee"); and *Bates v. Hunt*, 3 F.3d 374, 378 (11th Cir. 1993) ("For some categories of employees such as those in

a confidential or policy-making relation to their public employer, First Amendment constitutional protection is often slight.").

C. There is No Split in the Circuits.

Bonds argues that the decision herein creates a split with the D.C. Circuit, which held that "[a]t a minimum, the employee's speech must relate to policy areas for which he is responsible." *Hall v. Ford*, 856 F.2d 255, 264 (D.C. Cir. 1988). This language was dicta, however, as the plaintiff's speech in *Hall* directly addressed policy areas for which he was responsible. *Id.* The actual test established in *Hall* is consistent with the Seventh Circuit's analysis: if the employee is a policymaker, "we ask whether the government interest in accomplishing its organizational objectives through compatible policy level deputies is implicated by the employee's speech." *Id.* This is precisely what the Seventh Circuit concluded: "Bonds's speech rightly troubled the County because it had undermined his credibility with several supervisors, and Ordinans reasonably believed that his hiring would have created workplace dissension." *Bonds*, 207 F.3d at 982 (App. 19).

Bonds next asserts that the Seventh Circuit decision "conflicts with" decisions of other circuits because all courts to have considered policymaking factors in a *Pickering* balancing have done so in the context of employee speech "contrary to the employer's decision, action, or policy in a particular area." *Pet.* at 18-21. While this

factual distinction may highlight the unusual factual context of this case, it does not relate to the ultimate question: whether the comments implicated the employer's interests in efficiency. Bonds points to no case in which a court hinged its decision on the nexus between the speech and the government employer's policies, as opposed to its actual or potential detrimental impact on the employer.

In fact, all of the cases cited by Bonds agree with the Seventh Circuit that an employee's policymaking status weighs heavily in favor of the government's interests in a *Pickering* balancing. For example, in *Gonzales v. Benavides*, 774 F.2d 1295, 1300 (5th Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986), the Fifth Circuit held that the *Elrod/Branti* analysis was, by analogy, a factor in assessing the government's interests in a *Pickering* balancing analysis. The Court was careful to note:

> Our analogy does not conflate the categorical approach of the political affiliation cases with the individualized balancing required in employee speech cases. We simply identified an additional government interest to be weighed in the balance. This court has since viewed employee speech and employee party affiliation as endpoints on a single continuum.

Id. at 1300 n.9. This analysis mirrors the Seventh Circuit's observation that "[t]he policymaking employee exception represents a subset of *Pickering* cases where the government employer's need for political allegiance from its

policymaking employees outweighs the employee's freedom of expression to such a degree that it obviates *Pickering* balancing." *Bonds*, 207 F.3d at 981 (App. 18).

Even more to the point, in *Barker v. City of Del City*, 215 F.3d 1134 (10th Cir. 2000), the Court specifically adopted the Seventh Circuit's analysis that " 'an employee's status as a policymaker bears considerable attention when weighing the interests of the government. . . . ' " *Id.* at 1139, *quoting Bonds*, 207 F.3d at 979. *See also Lewis v. Cohen*, 165 F.3d 154, 162, 165 (2d Cir. 1999), *cert. denied*, 120 S.Ct. 70 (1999) ("the *Pickering* balancing is affected by the nature of the disciplined employee's responsibilities"); *Moran v. State of Washington*, 147 F.3d 839, 846 (9th Cir. 1998) ("[T]he State's interest in avoiding disruption is magnified when the employee asserting the right serves in a 'confidential, policymaking, or public contact role.' ") (*quoting Rankin*, 483 U.S. at 390-91); *Flynn v. City of Boston*, 140 F.3d 42, 44 (1st Cir.), *cert. denied*, 525 U.S. 961 (1998) ("positions are less likely to be protected to the extent they are 'higher,' more 'political,' more 'confidential,' and so on"); *McEvoy*, 124 F.3d at 103 ("[T]he Supreme Court has ruled that the policymaking status of an employee is relevant to the *Pickering* analysis . . . . "); *Weisbach v. County of Los Angeles*, 119 F.3d 778, 783-84 (9th Cir. 1997) (speech by "high-level employee" would "necessarily impair" the employer's confidence in the employee's loyalty); *Rash-Aldridge v. Ramirez*, 96 F.3d 117, 119-20 (5th Cir. 1996) (noting the "unique governmental interest in securing the relationship" between policymaking employees and the elected officials they serve); and *Kinsey v. Salado Indep. Sch. Dist.*, 950 F.2d 988, 994 (5th Cir.) (en banc), *cert. denied*, 504 U.S. 941 (1992)

("[C]ases involving public employees who occupy policymaker or confidential positions fall much closer to the employer's end of the spectrum, where the government's interests more easily outweigh the employee's (as a private citizen).").

In light of this uniform recognition of the interrelationship between the *Pickering* public speech analysis and the *Elrod/Branti* policymaker analysis, the assertion of a split in the circuits is hollow.

What Bonds is really arguing in this Petition is his own version of a "categorical" test for certain First Amendment cases. According to Bonds, if a public employee's speech does not relate to the policies of the governmental employer, the government's interests in efficiency can *never* be implicated. That is, the second prong of *Pickering* is a nullity if the speech does not relate to specific policies of the employer.

Such a categorical test has no basis in either *Pickering* jurisprudence or logic. The Court has never suggested that the government's interest in efficiency and avoiding disruption can only be implicated by speech directed at the government employer's policies. The *Pickering* factors relating to the government employer's interests – specifically, whether the speech "has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise," *Rankin*, 483 U.S. at 388 – are not limited in any principled way to speech directed to the government's policies. As amply demonstrated by

this case, speech not directly addressing the employer's policies can directly impact working relationships and impede the performance of the speaker's duties.

As a result of Bonds' comments, several County Supervisors "reasonably believed that his hiring would have created workplace dissension," and the County Board Chairman concluded Bonds was "untrustworthy and disloyal" because he had "embarrassed his employer in explicit and provocative terms." *Bonds*, 207 F.3d at 982 (App. 19). It is of no constitutional moment that the speech giving rise to the potential disruption involved the policies of the City of Milwaukee rather than Milwaukee County; the potentially disruptive impact ensued from the extreme manner in which Bonds castigated his governmental employers, not from the specific target of his speech. An employer is certainly permitted to predict future conduct based on prior conduct. *See Connick*, 461 U.S. at 152. There is thus no principled basis for Bonds' proposed artificial, bright-line distinction between speech related to and unrelated to the employer's policies.

D. The Seventh Circuit Properly Applied the Standard of *Waters v. Churchill*.

Bonds' final attempt to identify a proper issue for certiorari is the assertion that the Seventh Circuit's decision is "contrary" to *Waters v. Churchill*, 511 U.S. 661 (1994). This argument devolves, however, to a factual disagreement regarding the "reasonableness" of the County's investigation and a groundless accusation that the County's decision was based on "rank speculation."

Waters does not mandate any specific level of investigation by a governmental body when it disciplines an employee: "We must therefore reconcile ourselves to answering the question on a case-by-case basis, at least until some workable general rule emerges." *Waters*, 511 U.S. at 671. The *Waters* Court established the analytical framework within which governmental assertions of harm will be reviewed, beginning with the following guidepost:

> [W]e have consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large. Few of the examples we have discussed involve tangible, present interference with the agency's operation. The danger in them is mostly speculative. . . . But we have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern . . . .

Id. at 673. The Court clarified that such decisions are not subject to the same type of review as a judicial proceeding, and that governmental employers are free to rely on hearsay, past conduct and their own subjective knowledge of a person's credibility. *Id.* at 676. A reviewing court must look to "the facts as the employer *reasonably* found them to be." *Id.* at 677. *See also Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 677 (1996) ("*Pickering* requires a fact-sensitive and deferential weighing of the government's legitimate interests.").

The Seventh Circuit's analysis is wholly consistent with this standard. The Court expressly examined the

facts as Milwaukee County "reasonably believed" them to be, and gave "substantial deference" to Milwaukee County's predictions of harm. *Bonds*, 207 F.3d at 982-83 (App. 19-20). The Court analyzed the actual evidence submitted by Milwaukee County, which showed that Bonds had "undermined his credibility with several supervisors," and that Chairman Ordinans considered Bonds "to be untrustworthy and disloyal." *Id.* at 982 (App. 19). As to the County's investigation, the Court found the County's conclusions to be reasonably based upon "the newspaper report, Hart's [Ordinans' Chief of Staff] telephone discussion with Bonds and Bonds' written apologies to Mayor Norquist and the Council." *Id.* (App. 20).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MICHAEL BONDS,

Plaintiff,

Civil No. 97-C-0921

vs.

MILWAUKEE COUNTY,

Defendant.

TRANSCRIPT OF DECISON OF THE COURT

Record made in the above-entitled matter before the Honorable J. P. Stadtmueller, Judge of said Court, on April 20, 1999, commencing at 8:32 a.m.

APPEARANCES

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MR. ROBERT FRIEBERT and MR. MATTHEW O'NEILL, of Friebert, Finerty & St. John, SC, 330 E. Kilbourn Avenue, suite 1250, Milwaukee, WI 53202-3146 on behalf of the Defendant.

* * *

[2] PROCEEDINGS

THE CLERK: The court calls case number 97-C-921 for the reading of a verdict. May I have the appearances, please, beginning with the plaintiff's counsel.

MR. BAUMAN: Appearing on behalf of the plaintiff, Attorney Robert J. Bauman.

MR. O'NEILL: Appearing on behalf of the defendant, Milwaukee County, Matthew O'Neill and Robert Friebert of Friebert, Finerty & St. John.

THE COURT: Good morning, Mr. Bauman. Good morning to you, Mr. Bonds. Good morning to you, Mr. Friebert, Mr. O'Neill, and good morning to you, Ms. Ordinans.

As I indicated at the conclusion of our trial day yesterday, the court took the opportunity last evening to consider not only a review of the testimony that was presented yesterday but all of the exhibits to which the court had some degree of familiarity with most of them given the fact that this court has on two prior occasions dealt with the underlying facts in the context of a Motion for Summary Judgment that was addressed in a written decision by the court back on April 20th of last year, in fact a year ago to the day, as well as a second motion made to dismiss the individual defendants that was addressed in a written decision by the court on December 7th of last year in which I found that the individual named defendants, Karen Ordinans, William Hart and [3] Thomas Kuzma, were all immune from the claims of the plaintiff.

My purpose this morning is not to redigest all of the issues that the court did address in the prior rulings, but to begin with a comment that I made during one of our colloquies yesterday; and that is, as a consequence of the parties refocusing on the matter of Mr. Bonds' status, while I am not at all certain that it would have been appropriate for the court to grant summary judgment on either side of the issue in April of 1998, the cases of

Marquez v. Turnock and to a lesser extent *Youker v. Schoenenberger,* both of which are Seventh Circuit cases, the first one 967 F.2d 1175 written by Judge Cudahy back in 1992 and a succeeding case *Youker v. Schoenenberger,* 22 F.3d 163, a Seventh Circuit case from 1994 authored by Judge Coffey, cause the court and I think frankly defendant's counsel to address in a more pointed way the matter of whether or not the comments of Mr. Bonds at the meeting back in July of 1997 were made as a city employee or as a private citizen because seemingly under the *Pickering* analysis, namely, *Pickering v. Board of Education,* 391 U.S. 563, and its successor line of cases, including several from the Seventh Circuit, but *Connick v. Myers,* 461 U.S. 138; *Wilbur v. Mahan,* 3 F.3d 214, a Seventh Circuit case from 1993; *Marshall v. Porter County Planning Commission,* 32 F.3d 1215, again a Seventh Circuit case from 1994; and [4] *Warzon v. Drew,* 60 F.3d 1234, all in their own way address the factual underpinnings of a particular set of comments or reports authored by citizens or employees of various governmental agencies. And what the court is struck with, of course, in all of these underlying cases is that they are intensely fact driven; and in no small measure this case is similarly intensively fact driven.

And we come this morning to address whether or not Mr. Michael Bonds' comments at the Community Brainstorming Forum on Saturday, July 26th of 1997 were constitutionally protected under the First Amendment subjecting Milwaukee County as the remaining defendant in this case to damages for having withdrawn a previously made and accepted offer of employment to Mr.

Bonds to serve as a policy research analyst with Milwaukee County.

Now, as the court has indicated in the context of the Motion for Summary Judgment, that issue was not resolved. Similarly, as to Milwaukee County it was not resolved as to the qualified immunity argument since that pertained only to the individual named defendants in Mr. Bonds' action.

So the question I think is now framed as to whether or not the facts and the applicable law within the parameters that the court has framed it requires that Mr. Bonds be allowed to recover the stipulated damages in this case, namely, $5,000 for wages and an agreed sum of $20,000 for compensatory [5] damages.

The court's analysis begins where the Motion for Summary Judgment and the qualified immunity orders that I previously addressed left off. From what the court has gleaned from listening to some 13 or 14 witnesses yesterday in substance really does not take quarrel with the facts that the court had before it in the context of the Motion for Summary Judgment. Some of the matters were more clearly focused, but in the main there really was not an awful lot in terms of core facts that differed from counsel's presentations during the summary judgment stage and the qualified immunity argument.

Rather than deal extensively with those facts in the context of my ruling this morning, I'm simply going to reference the facts that were addressed in my prior rulings; and by the same token I am prepared in order to put the record in a more complete state to adopt each of the

factual statements that have been submitted by the defendant as Proposed Findings of Fact.

And in that regard I would note parenthetically that although the facts as submitted by the defense in their Proposed Findings of Fact have been adequately referenced in the exhibits together with the testimony of various witnesses, since the court did not have the benefit of the testimony of Mr. Fred Gordon or Marilyn Figueroa, whose testimony is suggested in support of several of the numbered Proposed [6] Findings of Fact which in total number 22, I would simply note that although those two witnesses did not testify, there is ample other evidence in the record to support each of the Proposed Findings of Fact and Conclusions of Law, whether it be the exhibits that were received or the actual testimony of other witnesses.

Based upon those facts, and in accordance with the court's application of the law, I am constrained to conclude in this case that for purposes of the *Pickering* analysis, Mr. Bonds at the time he spoke to the Community Brainstorming Forum on January – strike that, on July 26th of 1997 was acting as a public employee and not as John Q. Citizen. I make that conclusion in light of the testimony and exhibits that were received, most notably the program itself as outlined in Exhibit No. 9 in which Mr. Bonds is identified as a community development policy committee analyst.

Now, it doesn't say the City of Milwaukee, but the court need not leave common sense at the doorstep in coming into the courthouse to conclude that all of the five speakers who were present at the Saturday, July 26th,

forum were in fact City of Milwaukee employees, and the subject of the forum on that occasion was community block grants.

And while Mr. Bonds attended this forum at the request of an alderman who had requested that he appear on his behalf, that is, the Alderman's behalf, the fact remains that [7] Mr. Bonds was in my view and from the record evidence there in an official capacity. And while the facts may be different had Mr. Bonds gone and sat in the audience and participated as a member of the neighborhood or the community who made up the audience, he was there in another capacity, that is, as a program participant in a formal sort of way.

Now, as the court reviews the line of cases beginning with *Marquez-Turnock,* particularly at the district court levels judges like myself have honed in on this issue of whether or not the individual was speaking as a citizen or as a public employee. And if there be a bright line in these analyses, in my view it is quite clear that this case is not even close as to Mr. Bonds being there in the role of a city employee.

And it is one thing for participating in a forum such as this and with the blessing of the chairman of the block grant policy committee to talk about the analyses that were addressed in I believe it was Exhibit No. 11, to talk about the bare bones facts; but when those comments escalate to the comments that found their way into a *Milwaukee Journal Sentinel* article on Sunday, July 27th suggesting that the plan adopted by the Milwaukee Common Council on Friday, July 25th, was sinister and that those interested in taking a position ought to go to City

Hall and, quote, "raise hell" or to suggest that if the Mayor were to sign off on the proposal that he ought to be suitably subject to a recall petition goes [8] well beyond those comments that one would expect from a community employee with the City of Milwaukee who is actually employed in what can only be described as a policy position, a confidant, if you will, of those involved in the community block grant program, whether it be the committee of the Common Council or indeed the Common Council itself.

The court concludes from the credible evidence before me that the matters that were addressed in the *Journal Sentinel* article were substantially in keeping with the comments that were noted in quotes. I find nothing to suggest that the article as a whole was taken out of context. Indeed the apology to the Mayor addressed by Mr. Bonds in his testimony and memorialized in a June – strike that, July 28th, 1997 communication which is before the court as Exhibit 17, as well as a similar document sent to members of the Council, although certainly it does not present itself as an apology, in effect Mr. Bonds suggested that it was in his view along those lines as well as some clarifications.

Although there was some colloquy between counsel and the witness as to how it was he was present at the meeting and whether he would – would or would not have been there were it not for the fact that Alderman Gordon invited him to appear as a representative of the Milwaukee committee dealing with the block grant program as an analyst, that said, it does not in the court's view give Mr. Bonds the unfettered right to make [9] the comments that he did which in the eyes of his soon-to-be

employer, namely, Milwaukee County, raised all sorts of red flags, particularly against the backdrop of some of the matters that Mr. Hart testified about in terms of a scenario of what would be expected in terms of professionalism, et cetera.

And it is difficult for any fact-finder to conclude that based upon that interview that where things went so wrong in terms of Mr. Bonds being sensitive to the very issues that his new employer had raised, yet that colloquy did not find its way into Mr. Bonds' thinking, whether it be the heat of the moment in terms of being frustrated with what the Common Council did on Friday, whether it be aligning himself for some future course of action.

After all, Mr. Bonds is no babe in the woods when it comes to the hurly-burly of political life having run for public office himself knowing full well that you can't wear the political hat when you're doing in essence work in an analytical sense for a committee of the Common Council or the Milwaukee County Board. It would be no different were a judge's law clerk, for example, having spent time working on a particular matter for the court gone out to a Bar Association meeting and publicly castigated the court or the judge that he or she may have been working for for having taken a particular position or ruled in a particular manner on a particular case.

[10] Now, having said what I did with respect to the matter of Mr. Bonds being cast in the role here of an employee speaking on an issue as opposed to a [sic] ordinary citizen, I obviously would like to make a record in this case that also addresses the *Pickering* analysis

which is fundamentally where the court left off in its decision on summary judgment in April of last year.

While I believe this case in the final analysis ought to turn on the matter of Mr. Bonds' status in connection with the comments that were made at the Brainstorming Forum, the cases that I have cited, and there are a number of others beyond the Seventh Circuit, beyond *Marquez* and *Youker,* I am uncomfortable since the Seventh Circuit in both of those cases while acknowledging the proposition that I am finding to be very poignant and appropriate in this case did not in the final analysis base their decision solely on the fact that at the time the individual made the comments, he or she did so in the role of being a public employee as opposed to a private citizen which brings me to the matter of the *Pickering* analysis.

And in this respect I am also constrained to conclude that Mr. Bonds does not pass the test in terms of balancing Milwaukee County's interests in having a staff member, in this case an analyst for the County Board, whether it be on block grant programs or more effective utilization of human [11] resources or matters dealing with recreation in the county park system, whatever the task may be, these individuals employed as the various witnesses on both sides through the course of their testimony yesterday made crystal clear are entitled to have people in these positions who are reposed with a degree of confidence and trust by those charged with the responsibility of ultimately taking formal positions in the governance of the activities that may be before them.

And to be sure the comments that Mr. Bonds made in the context of the Brainstorming session caused considerable upheaval. Some might describe it as rancor and others would describe it as in light of these activities this is not someone that I could work with or could trust because of having taken a public position.

And while we are all entitled to our private opinions on anything or any subject, there does come a point in the context of public employees who are called upon to do particular tasks in government and to do so in a way that the employer in this case, the Chairman of the Milwaukee County Board, could repose her confidence in not only the ability but the exercise of good judgment and the ability to do his job in a manner that presents the facts as opposed to taking opinion or making his opinions known in a very broad sense with various community action groups.

Those frankly are left better for the roles of the elected [12] officials in terms of the politic of the position. And if it be truly Mr. Bonds' role to want to become more active in community activities, obviously there are other positions, whether it is elected officials, speech writers, what have you, that can and often do take more active roles in the community just as these individuals take active roles in the community when it comes to the matter of advocacy, whether it be lobbying for a particular group on a particular proposed piece of legislation or what have you.

But that is not the role that Mr. Bonds was cast in as a City of Milwaukee employee; and more importantly as related to the underlying facts of this case it is equally

important that the court take cognizance of not only what was on the County Board Chair's mind when it came to interviewing and selecting someone for the analyst position but within a matter of weeks if not days the very trust that the County was seeking in the person to fill the position was outright violated in terms of the comments that were made at this Brainstorming session resulting in Mr Bonds, as I've indicated, apologizing.

Although in some sense yesterday he tried to paint the article that appeared in the Sunday paper on July 27th as being distorted, et cetera, that is belied in my view by a more contemporaneous document, namely, Exhibit 18, with respect to the minor clarifications; and in light of the overall inflammatory nature of some of the comments, I find it [13] to be extremely minor in the large picture, as it were.

Accordingly, again I am constrained to adopt the proposed Conclusions of Law that were submitted by the defendant; and based on those findings as to facts and the law, I direct the clerk to enter a judgment finding that the defendant have and take nothing on his remaining claim against Milwaukee County and that the action as against Milwaukee County be and the same is herewith dismissed on its merits together with costs as taxed by the Clerk of the Court.

The court stands in recess.

(The proceedings concluded at 9:03 a.m.)

CERTIFICATE

I, Christine L. Petrie, Official Court Reporter, United States District Court, Eastern District of Wisconsin, do hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated this 20th day of April, 1999.

/s/ Christine L. Petrie
Christine L. Petrie, RMR
Official Court Reporter